91-1209

Supreme Court, U.S.
FILED
JAN 22 1992
OFFICE OF THE CLERK

No. 91 ___

In The

Supreme Court of the United States

October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR., Secretary of the Interior,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a purported homesteader can obtain legal or equitable title to land that was withdrawn from entry for federal power purposes at the time it was occupied and settled.

2. Whether the Federal Land Policy and Management Act provides the Secretary of the Interior with the authority to divest Indian tribes of title to land held in trust by the United States.

3. Whether land that was conditionally ceded by an Indian tribe becomes public land before the conditions of the cession agreement are met.

4. Whether the Federal Land Policy and Management Act provides the Secretary of the Interior with the authority to convey land that is no longer public land.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners the Northern Arapaho and Shoshone Tribes ("Tribes") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 14, 1991.

OPINIONS AND ORDER BELOW

The opinion of the Court of Appeals is reported at 942 F.2d 712 and is reproduced in the Appendix ("App.") at 1a to 14a. The Tenth Circuit's unpublished order denying the Tribes' petition for rehearing is reproduced at 58a to 59a. The United States District Court for the District of Wyoming's

unpublished opinion is reproduced at 15a to 32a. The opinion of the United States Department of the Interior, Interior Board of Land Appeals, is reported at 102 IBLA 256, and is reproduced at 33a to 52a. The decision of the Bureau of Land Management, Wyoming State Office, is reproduced at 53a to 57a.

JURISDICTION

The opinion of the Court of Appeals was entered on August 14, 1991. Its order denying Petitioners' timely request for rehearing and suggestion for rehearing *en banc* was filed on October 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations, relevant portions of which are set out verbatim in the Appendix:

Act of March 3, 1905, ch. 1452, 33 Stat. 185 (App. at 60a to 64a).

Order of the Secretary of the Interior of July 2, 1910, withdrawing certain lands from entry (App. at 65a to 69a).

Order of the General Land Office of May 10, 1928, interpreting powersite withdrawal No. 115 (App. at 70a to 71a).

Order of the General Land Office of November 17, 1928, opening certain lands in Section 28, T. 6 N., R. 6 E., to entry (App. at 72a to 74a).

Order of the Secretary of the Interior of August 28, 1942, restoring lands to tribal ownership (App. at 75a to 79a).

Act of October 21, 1976, §102, 90 Stat. 2744, 43 U.S.C. §1702(e) (App. at 80a).

Act of October 21, 1976, §316, 90 Stat. 2770, 43 U.S.C. §1746 (App. at 80a).

STATEMENT OF THE CASE

In this case, Respondent Oliver J. Foust ("Foust") seeks to correct alleged errors in two patents, pursuant to section 316 of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §1746, App. at 80a, granted to his predecessor-in-interest, Byron H. Smith ("Smith"). The land Foust seeks to obtain by the patent correction application is within the boundaries of the Wind River Indian Reservation ("Reservation") and is, as it has been since the Reservation was first established in 1868, held in trust for the Tribes.[1] The Court of Appeals overturned the decision of the United States District Court for the District of Wyoming ("District Court") sustaining the decision of the Interior Board of Land Appeals ("IBLA") denying Foust's request to correct patents.

A. Opening of the Reservation

The Reservation is situated in west central Wyoming and was established by treaty between the United States and the Eastern Band of Shoshone Indians on July 3, 1868. *See* 15 Stat. 673. The original land reserved for the exclusive use and benefit of the Indians encompassed 3,054,182 acres. Beginning in 1874, Congress approved a series of cession agreements that dramatically diminished the Reservation trust

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[1] In the Appendix to the District Court's Opinion, found at App. 32a, is a map which will assist the Court in its understanding of this case. Smith obtained patents to Lots 4 and 5 and the NE¼SE¼ of Section 28 as depicted on the map. He built his improvements, however, on the SW¼ NE¼ of Section 28, for which he never applied, paid or received a patent. It is the SW¼NE¼ that is at the heart of this dispute. (On the map at App. 32a, the SW¼NE¼ has been divided into three Lots; 9, 11 and 12. Lot 11 contains all the Smith/Foust improvements.) The SW¼NE¼ was conditionally ceded by the Tribes in 1905, was reserved by the United States as a potential powersite in 1910, was restored to the Tribes in 1942, and is now held by the United States in trust for the Tribes. The decisions of the District Court, App. at 15a, and the IBLA, App. at 33a, include detailed discussions of the facts.

land owned by the Tribes. *See* Brunot Agreement, 18 Stat. 291 (Dec. 15, 1874); First McLaughlin Agreement, 30 Stat. 93 (July 7, 1897). In 1905, the Tribes conditionally ceded all land within the Reservation north of the Big Wind River. *See* Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"). The conditionally ceded land included Lots 4, 5 and the NE¼SE¼ of Section 28, for which Smith ultimately received patents, and the SW¼NE¼ of Section 28, which Smith unlawfully settled and Foust now seeks to obtain.

Certain lands within the conditionally ceded territory were withdrawn as potential powersites by the Secretary of the Interior's ("Secretary") Order of July 2, 1910. App. at 65a to 69a. The withdrawn land included Lots 4 and 5, and the SW¼NE¼ of Section 28. In 1928, the General Land Office opened Township 6 North, Range 6 East, to homesteading. However, the General Land Office recognized that certain lands had been set aside as a powersite reserve, and specifically excluded from settlement "*lots 1 to 8* inclusive, *SW¼ NE¼*, W½NW¼, NW¼SW¼, Section 28." App. at 73a (emphasis added).

B. Patenting of Land to Smith

On December 9, 1929, Smith filed his original application for a stockraising homestead entry on the NE¼SE¼ of T. 6 N., R. 6 E. This application was designated as Stockraising Homestead Entry Serial No. C-050733. Smith's application to enter the NE¼SE¼ was initially rejected by the General Land Office on the ground that the land was no longer subject to entry under the 1905 Act.[2] Smith appealed this decision and the General Land Office eventually reversed itself and granted Smith's application.

On March 18, 1930, while his appeal concerning Homestead Entry Serial No. C-050733 was pending, Smith filed an application for an additional stockraising homestead entry on Lots 4 and 5. This application was designated as Stockraising

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[2] The NE¼SE¼, Smith's original entry, was not among the lands reserved for powersite purposes.

Homestead Entry Serial No. C-051835. Lots 4 and 5, however, were reserved from entry, having been set aside for powersite purposes on July 2, 1910. App. at 65a to 69a, 73a. Pursuant to section 24 of the Federal Power Act, 16 U.S.C. §818, Smith applied for the restoration of entry to Lots 4 and 5. On February 26, 1930, the Federal Power Commission issued a determination that no injury would occur if Lots 4 and 5 were restored to entry. Thereafter, the Secretary issued an Order restoring Lots 4 and 5 to entry effective June 12, 1930. Smith's application to enter Lots 4 and 5 was approved on March 16, 1931.

After his two applications were approved, Smith proceeded to build a house and other structures. Smith, however, constructed his improvements in a narrow valley unique to the area, colloquially referred to as "the draw", in the SW¼NE¼ of Section 28, rather than on lands that he had been authorized to enter under the public land laws.[3] The SW¼NE¼ had been withdrawn for powersite purposes and specifically *excluded* from the opening of other acreage in Section 28. App. at 72a to 74a.

Smith was issued patents for the NE¼SE¼ on November 12, 1936, and Lots 4 and 5, on November 24, 1936. No patent was issued for the SW¼NE¼ powersite reserve[4] where Smith had unlawfully placed his improvements.

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[3] In his petition for designation, Smith included a map that correctly depicted the relationship between Lots 4 and 5 and his original entry on the NE¼SE¼. He also noted the acreages attributable to each entry which are taken from the original survey of the area, approved and accepted by the General Land Office in 1928. The 1928 survey that Smith obviously referred to in drafting his depiction of the entries, clearly shows that the draw in which he built was located outside Smith's claimed entries. The location of the quarters and lots in the 1928 survey were confirmed during the 1980 resurvey of Section 28. *See* App. at 49a.

[4] A patent could not have been issued to Smith for the SW¼NE¼ because he never undertook to apply for its restoration of entry under the Federal Power Act as he had done for Lots 4 and 5. *See* 16 U.S.C. §818; *Lee v. United States*, 22 Cl.Ct. 457, 465-66 (1991).

C. Restoration of the SW¼NE¼ Powersite Reserve to the Tribes

Before Smith settled on conditionally ceded land in the Reservation, the United States Supreme Court had held that Indian land opened under agreements similar to the 1905 Act were not "public lands" but remained "Indian lands" until all the conditions set out in the agreement were fulfilled. *Ash Sheep Company v. United States*, 252 U.S. 159, 164-66 (1920).[5] Congress later revoked the authority of the United States to sell opened and unsold Indian lands by the Act of June 18, 1934, codified at 25 U.S.C. §§461-463. By the Act of July 27, 1939, codified at 25 U.S.C. §575, Congress directed the Secretary to restore to the Tribes full ownership of all undisposed of lands in the 1905 Act area of the Reservation. By Restoration Order of August 28, 1942, the Secretary specifically restored to the Tribes all undisposed of land within Section 28, T. 6 N., R. 6 E., App. at 75a to 79a. The restoration, of course, included the SW¼NE¼ on which Smith had built, but for which he had never applied, paid, or received a patent.

D. Foust's Purchase of the Land Patented to Smith

Respondent Foust purchased the Smith homestead from the original entryman's widow in 1963, more than twenty years after the SW¼NE¼ had been restored to tribal ownership. Before consummating the purchase, Foust spoke to a survey engineer. After being advised that a survey would be expensive, Foust elected not to hire a surveyor. Moreover, he apparently elected not to examine the United States Geological Survey ("USGS") maps or the official 1928 survey to

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[5] Specifically at issue in *Ash Sheep* were Indian lands that were, by agreement with the Crow Tribe, opened for non-Indian settlement, but which would be purchased from the Indians only on a tract-by-tract basis. The terms of the agreement were virtually identical to the 1905 Act at issue here. *See* App. at 60a to 64a. The *Ash Sheep* court held that these lands remain Indian lands until actually sold.

ensure that the buildings constructed by Smith were on the property purchased by Foust.

E. Discovery of the Foust Trespass

In the late 1960s, while performing routine land work, an employee of the Bureau of Indian Affairs ("BIA") discovered that the improvements constructed by Smith were located on tribal, rather than private, land. USGS maps showed the location of the Smith/Foust improvements and a simple comparison with land ownership maps disclosed that the improvements were located on tribal land. The BIA employee did not even have to leave his desk in order to discover the trespass. Later, another BIA employee visited the site to confirm the trespass. For unknown reasons, the BIA did not inform the Tribes of the trespass until November 1, 1979.

F. The Proceedings Below

Foust originally applied to the Bureau of Land Management ("BLM") for a patent correction, whereby Lot 5 would be deeded back to the United States in exchange for Lots 9, 11 and 12, which comprise the SW¼NE¼ of Section 28. In support of his proposed correction, Foust claimed that Smith erroneously built on Lot 11, rather than Lot 5. As the possessory and beneficial owners of non-patented land within the Reservation, including the SW¼NE¼, the Tribes intervened to oppose Foust's application for a patent correction before the BLM.

The mistake claimed by Foust before the BLM, significantly, was inconsistent with Smith's statement in his final proof that his residence was built on his original entry, NE¼ SE¼ of Section 28, not Lot 5. *See* App. at 44a. The NE¼SE¼ does not share a common boundary with the SW¼NE¼, where Smith actually built. *See* App. at 44a. Recognizing this inconsistency, the BLM decided that Smith must have been in error as to the description of both his original entry on the NE¼ SE¼, and his subsequent entry on Lots 4 and 5. To correct the succession of errors, the BLM ordered several conveyances that were inconsistent not only with Foust's claims, but with

the claims made by Smith in his final proof. *See* App. at 54a to 55a. First, the BLM ordered that Smith's original entry, the NE¼SE¼, on which Smith claimed he had constructed his residence, be deeded back to the United States in exchange for the SE¼NE¼ (Lot 10 on the map at App. 32a). Neither Foust nor Smith ever made any claim to that parcel. Next, the BLM ordered that Foust deed Lot 5, where Smith claimed to have constructed only a garden fence, back to the United States in exchange for the Tribes' land at the SW¼NE¼, where Smith unlawfully constructed his residence.

On May 23, 1988, after a full hearing, the IBLA issued its decision reversing the Wyoming State Office of the BLM. App. at 33a to 52a. The IBLA concluded that under section 316 of FLPMA, 43 U.S.C. §1746, App. at 80a, the Secretary has the "discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground." App. at 42a. The IBLA held that the Secretary is only permitted to issue an amended patent if there is a clear showing of factual error, as opposed to a legal error, *see* 43 C.F.R. 1865.0-5(b), and the equities favor the applicant.[6] Applying these principles, the IBLA found that Foust failed to demonstrate the mistake of fact necessary for the issuance of an amended patent, and could not demonstrate the equities needed to establish his right to a patent correction.

The patents issued to Smith, the IBLA concluded, correctly describe the land he sought in his applications. In addition, the IBLA considered dubious Foust's assertion that Smith intended to build his home on Lot 5. This statement, the IBLA found, was inconsistent with Smith's own declaration that his residence was on the NE¼SE¼ of Section 28, not on Lot 5. The IBLA noted that since the NE¼SE¼ and Lot 11,

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[6] The Tenth Circuit confirmed that a patent can only be corrected if the applicant makes a clear showing that there was a *mutual mistake of fact* by the patentee and the United States, and the equities that extend to the applicant must favor correction. App. at 7a, 11a.

in the SW¼NE¼ where Smith built his residence, do not adjoin one another, it was unlikely that Smith mistakenly confused the location. The IBLA also found that the land where Smith's buildings were placed, the SW¼NE¼, was not purchased pursuant to the terms of the 1905 Act, was withdrawn for powersite purposes in 1910, and remained withdrawn until 1942, when it was restored to full tribal ownership. The IBLA concluded that had Smith applied for entry onto Lot 11, no patent could have been issued and that this fact alone "negates entirely the possibility that a mistake was made in the description of the patented land". App. at 44a.

The IBLA also held that the equities did not favor Foust's application because he did not exercise due diligence in verifying the correctness of the property being conveyed to him. This finding was greatly influenced by evidence in the record that the BIA discovered the trespass by using a USGS map "and master title plats for the Reservation" and Foust failed to review the 1928 survey, which clearly showed that the draw in which Smith built was not within the land patented to him. App. at 47a. The IBLA also noted that the fiduciary responsibilities owed by the United States toward Indian tribes forbid correcting the Smith patents.

Foust sought review of the IBLA decision in the District Court under the Administrative Procedures Act, 5 U.S.C. §§701-706. The District Court, recognizing that its review of final agency action is "very deferential", App. at 19a, sustained the IBLA's decision on the Secretary's and Tribes' motion for summary judgment. The District Court found that Foust had not made a sufficient showing to establish that a mistake of fact existed in the patents, and the equities did not favor Foust because he had not exercised due diligence when he purchased the disputed property from his predecessor. App. at 30a to 31a. Additionally, the District Court held that Foust could not obtain a corrective patent for land that was not open to entry at the time Smith settled and constructed his improvements. App. at 26a to 27a.

Despite reaffirming the deferential standard of appellate review of final agency action, App. at 3a to 4a, and Foust's

failure to exercise due diligence, App. at 12a, the Tenth Circuit reversed the IBLA decision. The court held that the IBLA and the District Court had ignored evidence of material mistake of fact in the issuance of the patents and that equity warranted amendment of the patents as ordered by the BLM. In reaching its conclusion, the Tenth Circuit recognized that its decision requires that the Secretary convey to Foust land that is held in trust for the Tribes. App. at 6a. The court, however, found that under 43 U.S.C. §1746, only the status of the land in question at the time of entry was an issue. The court concluded that the SW¼NE¼ of Section 28 was "public land" at the time Smith entered and Foust could obtain a corrective patent to include that parcel, despite the fact that it was closed to entry at the time Smith entered *and* despite the fact that the SW¼NE¼ was not public land, but remained Indian land.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has issued a decision that rewards squatters for the unlawful entry onto reserved and Indian land and threatens the certainty by which patentees and other grantees of public land hold title. In this case, original entryman Smith built his house on the most beautiful site in the area, notwithstanding the fact that the site was not available to entry. His successor, Foust, who *purchased* land patented to Smith, now seeks to obtain title based upon Smith's unlawful entry and possession. The decision, contrary to all precedent, recognizes title based upon the unlawful entry and possession of land withdrawn from entry. Moreover, the court's remedy provides for the conveyance of Indian land without the requisite specific approval by Congress. The decision conflicts with time-honored precedent of this Court with respect to federal public and Indian land. In both instances, the decision threatens Congress' designations of land for public purposes. Absent reversal by this Court, the decision will provide a foothold for squatters to advance their claims and validate their unlawful activities.

I. THIS CASE DEMONSTRATES THE IMPORTANCE OF CLARIFYING THAT THE OCCUPATION OF WITHDRAWN PUBLIC LAND DOES NOT CREATE AN INTEREST IN THAT LAND

A. The Decision Conflicts With This and Other Courts' Prior Holdings Recognizing That a Homesteader Who Occupies Public Land That Has Been Withdrawn from Entry Acquires No Legal or Equitable Rights

This Court long has held that a settler does not secure a legal or equitable interest to public land that is not open to homestead.[7] Despite this rule, the Tenth Circuit found that Smith, by his occupation and settlement, acquired a valid interest in reserved land of the United States. The time-honored protections inherent in the very practical requirements that patentees settle only on available public lands and acquire no legal or equitable interest by settlement of land reserved from entry is abolished under the Tenth Circuit's analysis. Squatters such as Smith and his successors can, by their occupation of unavailable land of the United States, obtain an interest that, through a corrected patent, evolves into fee title. Such a reward for unlawful settlement flies in the face of precedent at every level.

In a series of cases, this Court recognized that a purported homesteader acquires no valid right or interest in public land that is not open to entry. Moreover, the Court recognized that until the land was made available for entry and the prerequisites for settlement fulfilled, Congress could not be deprived of its power to dispose of the land or to appropriate it to any public use.

Over one hundred years ago, a purported homesteader claimed that, by his occupation of and improvements on public land before the land was opened to settlement, he had

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[7] As the Tribes will demonstrate, the SW¼NE¼ of Section 28 not only was unavailable for entry because of its withdrawal as a potential powersite, but has always remained "Indian land" because it was never sold pursuant to the terms of the 1905 Act.

somehow preempted Congress' power to dispose of the land as it desired. *Frisbie v. Whitney*, 76 U.S. 187 (1870). This Court, while recognizing the potential hardship its decision would bring to bear, found absolutely no basis on which the purported homesteader could claim a vested interest:

> [H]is claim rests solely upon his going upon the land and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right, or indeed any kind of claim to land. . . .

Id. at 193. Until all the statutory prerequisites for settlement are fulfilled, the Court concluded, one occupying public land obtains no vested rights or interest as against Congress, or those designated by Congress, as the legal possessor of the land. *Id.* at 194-95.

The Court expanded the *Frisbie* analysis and applied its rules to purchasers of improvements in *The Yosemite Valley Case*, 82 U.S. 77 (1873). In that case, a settler purchased a "house, outhouses and a fence inclosing about three acres" from the previous occupant. *Id.* at 79. He stated his intention to acquire title to the land under the preemption laws of the United States and began improving the premises and cultivating the land. The land had not been opened to homesteading and, sometime after the entry, Congress granted it to the State of California. This Court held that the purported homesteader's occupation and improvement of the land conferred no right to the land as against the United States, nor did it

> impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler.
>
> * * *
>
> The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the

> power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

Id. at 87.

Finally, this Court concluded that a purported homesteader who occupies land that had been *withdrawn* from "sale or location, preemption or homestead entries" acquired no equitable rights in the land. *Wood v. Beach*, 156 U.S. 548, 549 (1895). The Court's ruling provides useful insights in judging the activities undertaken by Smith in this case:

> [The homesteader] went upon lands which were not open to homestead or preemption entry, and cannot make his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and to the law. He deliberately took the chances of the railway company's grant, being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land.

Id. at 551.

The precedent of this Court establishing that by occupation and settlement a purported homesteader acquires no equitable or legal interest in land that is not open to or withdrawn from entry has been consistently applied in the lower federal courts,[8]

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[8] *See, e.g., Leo Sheep Company v. United States*, 570 F.2d 881, 888 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979) ("A patent cannot convey what has been reserved by law."); *Westling v. United States*, 60 F.2d 398, 405 (8th Cir. 1932) ("All he acquired in settling upon the land was a right of priority over other homesteaders 'in case the land should at some future time be opened for entry.' That is as

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and the Department of the Interior.[9] Most recently, the United States Court of Claims considered the precise issue presented in this case: whether a purported homesteader secured any ownership right to land under the homestead laws that had been set aside under the Federal Power Act as a possible site for future power projects. *Lee v. United States*, 22 Cl.Ct. 457 (1991).

The facts in *Lee* are startlingly similar to the facts surrounding Smith's entry on the SW¼NE¼ of Section 28. In 1950, the Federal Power Commission set aside certain lands near Anchorage, Alaska, as possible sites for future power projects. At the request of the BLM, the Commission determined that the land would not be injured for purposes of power development by location and entry under the public land laws. "Following that 'no injury' determination, the Secretary of Interior could have declared the lands open for homesteading and other entry, but did not." *Id.* at 459.[10] The

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far as the cases go, and that is as far as his rights go. He acquired no equitable title as against the government."); *United States v. Norton*, 19 F.2d 836, 839 (5th Cir.), *cert. denied* 275 U.S. 558 (1927) ("[S]ettlement does not confer on the settler any vested right to the land. It confers on him only a preference over others, *in the event the land is thrown open to entry*, but does not deprive the government the right to dispose of the land otherwise than under the preemption or homestead laws, or to appropriate it to any public use." [Emphasis added and citations omitted.])

[9] At least since 1917, the Department of the Interior has adhered to the rule that a settler who initiates his settlement when the land is not open to entry gains no rights thereby. *California & Oregon Land Co. v. Hulen & Hunnicut*, 46 L.D. 55 (1917). *See also Shirley A. Clark*, 77 IBLA 51 (1983); *Carmel J. McIntyre (On Judicial Remand)*, 67 IBLA 317 (1982). In *Mantle Ranch Corp.*, 47 IBLA 17 (1980), the only case the Tribes are aware of that considers a patent correction under section 316 of FLPMA, the property sought by the patent correction application was available for entry at the time it was originally settled.

[10] Smith obtained a "no injury" determination for Lots 4 and 5 which had been included in the powersite withdrawal. The Secretary then

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plaintiffs settled on the withdrawn and surrounding land in 1957, and made several inquiries regarding the status of the withdrawn land. In 1964, they received patents to all the land they claimed outside the powersite classification. In 1971, the classified land was patented to two Alaska Native Corporations under the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-1641 (1982). *Lee v. U.S.*, 22 Cl.Ct. at 459.

The Court of Claims, relying on this Court's decisions in *Wood*, *Yosemite Valley* and *Frisbie* held that the purported homesteaders had acquired absolutely no interest in the land reserved as a powersite because the land had not been open to homestead settlement. Not until the Secretary declared the land open to entry, which he did not do following the "no injury" determination, could the purported homesteaders acquire an interest. *Lee v. U.S.*, 22 Cl.Ct. at 464-65.

The Tenth Circuit's holding, without citation to any authority, that restoration of the SW¼NE¼ to the Tribes was subject to any mistaken boundary description, App. at 6a, stands the law, well in place since at least 1870, on its head. Smith had no valid or existing right in the SW¼NE¼ as against the United States or as against the Tribes. This Court should review the decision to make it clear that the law as it has stood for well over one hundred years cannot be swept aside to facilitate a patent correction.

B. The Decision Threatens the Integrity of All Withdrawn Public Land by Recognizing That the Unlawful Occupation of Such Land Can Evolve Into Fee Title

Public land belongs to the United States. *See, e.g.*, FLPMA, 43 U.S.C. §§1701-02. As each of the decisions

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declared Lots 4 and 5 available for homesteading and Smith ultimately received his patent which Foust later acquired and now claims is in error. There was at no time, however, a "no injury" finding for any part of the SW¼NE¼.

discussed above makes clear, until the United States declares public land open to entry, and the prerequisites for entry are fulfilled, it remains in the United States for any disposition or appropriation for public use. *The Yosemite Valley Case*, 82 U.S. at 87. (A settler cannot "impair in any respect the power of Congress to dispose of [withdrawn] land in any way it may deem proper. . . . ") Land appropriated by Congress for national forests, national parks, national monuments, Indian reservations, powersites and numerous other public purposes was all originally part of the public lands. As Justice Field recognized in *The Yosemite Valley Case*, 82 U.S. at 86-87, allowing settlers to acquire a vested interest in land not open to settlement would deprive Congress of the power to reserve public lands for necessary public uses.[11] Land withdrawn from entry can be re-opened, but *only* upon certain prerequisites. In the case of powersite withdrawals, the Federal Power Commission must make a "no injury" determination and the Secretary *must* thereafter declare the lands open to homestead entry. Until *both* prerequisites are fulfilled, the land remains

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[11] Justice Field stated:

> The simple question presented for determination is whether a party, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. If such be the effect of mere settlement, with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the government. It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by mere settlement of a party, with a declared intention to purchase, could be attributed to its legislation.

in the United States for its use and disposal. *See Lee v. U.S.*, 22 Ct.Cl. at 465.

The Tenth Circuit, however, accomplishes the precise result that the law as established in this Court and the lower federal courts clearly forbids. Congress deemed it proper to restore to the Tribes the SW¼NE¼ and other conditionally ceded land. *See* App. at 75a-79a. Yet, by its ruling, the court has recognized in Foust, who purchased Smith's patents, an interest of sufficient value to thwart Congress' and the executive's determination.[12]

The decision flies in the face of precedent holding that one who occupies withdrawn land acquires absolutely no interest.[13] It is in direct conflict with the Court of Claims' decision in *Lee*, which was decided less than seven months before this decision. And, perhaps most importantly, it provides a mechanism by which squatters on the national forests, national parks and other federal reservations can seek to have an interest recognized where none legally exists. If the decision below stands, the integrity of all lands withdrawn from the public domain and reserved for a particular public purpose will be subject to piecemeal attack by squatters who claim their occupation was a mistake.

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[12] Foust could not claim an interest in the SW¼NE¼ under the doctrines of estoppel, latches or adverse possession. *See* Trade and Intercourse Act, codified at 25 U.S.C. §177; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527, 541-44 (N.D. N.Y. 1977). Those claims, which are based upon State law, "are statutorily preempted by the Nonintercourse Act and the Supremacy Clause" and do not apply to Indian land. F. Cohen, *Handbook of Federal Indian Law*, 512 (1982 ed.).

[13] As the Tribes demonstrate below, FLPMA simply does not cast aside this preexisting law.

C. FLPMA Does Not Alter Preexisting Law That Holds Purported Homesteaders May Not Acquire Title To Land Withdrawn from Entry

Before 1976, the Secretary was expressly prohibited from amending a patent when the effect of the amendment would be to convey land that "has . . . been disposed of and is [not] subject to entry". 43 U.S.C. §697 (1964). The Tenth Circuit has concluded that the deletion of this language in section 316 of FLPMA demonstrates Congress' intent to abolish what has been a basic precept of public land law: entrymen acquire no rights or interest in land that was withdrawn or reserved at the time of entry. *See* App. at 5a to 6a.

As the District Court noted, App. at 27a to 28a, the legislative history is silent as to why the language of 43 U.S.C. §697, requiring the consideration of the availability of the land sought, was deleted from section 316 of FLPMA. The Tenth Circuit's analysis, however, leads it to impute to Congress the decision to overturn preexisting law by authorizing the Secretary to convey title to land that was withdrawn from entry at the time it was unlawfully settled. The interpretation advanced by the court allows a person, in knowing trespass, to gain advantage, as against the United States and its successors in interest, by settling on unavailable land. That result is in direct conflict with Congress' long recognized authority, confirmed by this Court in *Frisbie*, *The Yosemite Valley Case*, *Wood*, and their progeny, to reserve public land for whatever purpose it deems necessary. "[It] conceivably threaten[s] all lands in the public domain." App. at 28a.

The Tenth Circuit's decision provides that by way of a patent correction, Foust can acquire a vested interest in a parcel of land in which, by law, he and his predecessor previously held no interest. 43 U.S.C. §1746 has become, under the Tenth Circuit's interpretation, a mechanism by which those holding patents or other documents of conveyance validate unlawful entries onto withdrawn public land. To extend the provisions of FLPMA beyond its stated

limits[14] provides squatters like Smith, and their successors, with a reward for their unlawful actions. It is necessary, therefore, for this Court to review the decision and determine whether, under the guise of a FLPMA patent correction, an interest in public land can be created where none can exist by law.

II. THE DECISION THREATENS TRIBAL LAND THROUGHOUT THE NATION

A. The Decision Allows the BLM to Extinguish Indian Title Without the Consent of Congress

A conveyance, by any means, of Indian land has been subject to statutory restraints on alienation since enactment of the first Indian Nonintercourse Act, Act of July 22, 1790, ch. 33, §4, 1 Stat. 137. Conveyances of Indian land are *void* and of no validity in law or equity unless they comply with the Act or are otherwise unequivocally approved by Congress. *See* F. Cohen, *Handbook of Federal Indian Law*, 510-522.[15] Congressional approval of any conveyance must be made in clear and unequivocal terms. *Washington v. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 690 (1979); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670-74 (1974); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).[16]

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[14] As discussed below, *infra* at 28-29, the "errors" that may be corrected under 43 U.S.C. §1746, are limited to mistakes of fact not of law. 43 C.F.R. 1865.0-5(b) (1990).

[15] The Nonintercourse Act was reenacted in the Trade and Intercourse Act which is now codified at 25 U.S.C. §177, and states in part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

[16] In *Oneida*, this Court recognized the "*rudimentary* propositions that Indian title is a matter of federal law and can be extinguished *only* with federal consent. . . . " 414 U.S. at 670 (emphasis added).

These restraints on alienation apply equally to the executive branch. Absent congressional authorization, alienation of tribal land by executive action is void. *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339, 347 (1941); *Cramer v. United States*, 261 U.S. 219 (1923). Congress has on occasion made such delegations to the Secretary. *See* F. Cohen, *Handbook of Federal Indian Law*, 517. But, Congress never has authorized the Secretary to convey tribal land to facilitate the correction of a patent.[17] FLPMA certainly does not authorize such a conveyance and, in fact, expressly excludes "Indian lands" from any "public land" conveyance. 43 U.S.C. §1702(e)(2), App. at 80a. *See* discussion, *infra*, at 24-27.

Despite what this Court has recognized is a "rudimentary proposition", *Oneida*, 414 U.S. at 670, the Tenth Circuit held:

> We are . . . unpersuaded by the Indians' argument that the Secretary cannot correct a patent when doing so would require conveyance of tribal land. We agree that lands now held by the United States in trust for Indians are not public lands. *See* 43 U.S.C. §1702(e). The relevant inquiry, however, is

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[17] The Tenth Circuit states that the Secretary's responsibilities both to correct patents and to act as trustee for the Indians cannot operate against Foust who happens to have Indians as a neighbor. App. at 6a. Under the court's analysis, the fact that Foust happened to have another patentee as his neighbor also could not operate against Foust. He would likewise be allowed to take the neighbor's land by means of the patent correction provision. *See* discussion *infra*, at 27-28. Moreover, Congress has recognized that in title disputes between Indians and non-Indians, there is a presumption in favor of the Indians. 25 U.S.C. §194. When faced with a situation where two reasonable conclusions can be drawn from the facts, the law and the Secretary's trust responsibility require adoption of the conclusion that is most favorable to the Tribes. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982). Neither the Secretary, nor presumably the courts, can escape this rule by the Secretary donning the mantle of administrator. *Jicarilla Apache Tribe v. Supron Energy Co.*, 728 F.2d 1555, 1567 (10th Cir. 1984).

> whether the lands in question were public lands at the time the patent was issued.

App. at 6a.

The correction ordered by the BLM requires the conveyance of tribal land. That fact cannot simply be ignored as the Tenth Circuit did. The decision upholds the conveyance of tribal land without Congress' explicit authorization and is in derogation of Congress' admonishment that FLPMA is inapplicable to Indian lands. 43 U.S.C. §1702(e)(2). It is in conflict with the Trade and Intercourse Act and every applicable decision of this Court. It threatens what has proved to be the single most important legal proposition assuring the protection of the Indian land base and divests the Congress of its authority to determine when, and if, Indian land should be taken out of Indian ownership.

B. Conditionally Ceded Indian Land Remains Indian Land Until All Conditions of the Cession Have Been Met

The Tenth Circuit found that the Secretary may correct Foust's patents pursuant to 43 U.S.C. §1746, if the land in question was "public land" at the time the patent was issued. The court concluded that

> [t]he lot in question here, the SW¼NE¼, was owned by the United States, administered by the Secretary, and not held in trust for the Indians in 1936, and it therefore was public land under [43 U.S.C. §1702(e)].

App. at 6a. That conclusion directly conflicts with this Court's holding in *Ash Sheep v. U.S.*, 252 U.S. 159.

In 1905, the Tribes conditionally ceded land within the Wind River Reservation north of the Big Wind River, including the SW¼NE¼ of Section 28. *See* 1905 Act, App. at 60a to 64a. The 1905 Act lands were declared open for homesteading by Presidential Proclamation of June 2, 1906, but on July 2, 1910, the General Land Office specifically excluded from settlement, *inter alia*, Lots 4 and 5, which were ultimately

reopened to settlement, and the SW¼NE¼ of Section 28, as part of a reserved powersite. App. at 65a to 69a.

Before Smith entered the withdrawn SW¼NE¼, this Court issued its decision in *Ash Sheep*. There, this Court held that land ceded under terms that did not pay the Indians a fixed sum, but instead promised to use the proceeds from sales to settlers for the Indians benefit, *see* Article II, 1905 Act, App. at 61a to 63a, remained in the United States. Such land continues to be held in trust for the Indians until it is entered and sold pursuant to the terms of the agreement with the Indians. *Ash Sheep v. U.S.*, 252 U.S. at 165-66. In reaching its holding, this Court stated:

> [W]hile the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, *as their trustee*, it could make perfect title to purchasers, nevertheless, *until sales should be made*, any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "public lands"* in the sense of being subject to sale, or other disposition, under the General Land Laws. . . . Thus we conclude that the lands described in the bill were "Indian lands". . . .

Id. at 166 (citations omitted and emphasis added).

By the Act of July 27, 1939, codified at 25 U.S.C. §575, Congress directed the Secretary to restore to the Tribes all land opened under the 1905 Act that had not been sold. By the Restoration Order of August 28, 1942, App. at 75a to 79a, the Secretary specifically restored to the Tribes all undisposed of ceded land within Section 28, T. 6 N., R. 6 E. This, as noted, included the SW¼NE¼ on which Smith had built a house, but for which he had never applied, paid, or received a patent.

The Tribes maintained their beneficial interest in the SW ¼NE¼ of Section 28, and the land remained Indian land until legal entry and payment for the land by a homesteader. *See Ash Sheep*, 252 U.S. at 166. Smith did not legally enter and never paid for the SW¼NE¼. Moreover, nothing in the 1910

Order withdrawing the land from entry suggests any intent to extinguish the Tribes' beneficial interest.[18]

In 1942 the Tribes' full interest in the land was restored. Applying the *Ash Sheep* analysis to the facts of this case, the conditions precedent in the 1905 Act were never fulfilled with respect to the SW¼NE¼ of Section 28 and that land has continually maintained its status as "Indian land", at least since the Reservation was established in 1868.

The Tenth Circuit itself followed *Ash Sheep* in deciding that the Uintah and White River Bands of Ute Indians retained beneficial title to unallotted lands on their reservation which were restored to the public domain, but remained unsold. *Hanson v. United States*, 153 F.2d 162 (10th Cir. 1946). The United States, according to the Tenth Circuit, continued to hold the lands as trustee for the Indians until they were sold pursuant to the terms of the cession agreement. *Id.* at 163. Other federal courts have applied the *Ash Sheep* analysis to conditionally ceded land that was later withdrawn from entry on other reservations. The Court of Claims rejected the United States' contention that the Ute Tribe's interest in undisposed ceded land was destroyed when withdrawn for powersite purposes under section 24 of the Federal Power Act, 16 U.S.C. §818. *Confederated Band of Ute Indians v. United States*, 112 Ct.Cl. 123, 136 (1948). And, the Ninth Circuit, relying on the Tenth Circuit's analysis in *Hanson*, held that the United States' trustee status and the Coeur d'Alene Tribe's beneficial interest survived a withdrawal of ceded land for sale to the State of Idaho for use as a park. *State of Idaho v. Andrus*, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984).

In 1936, when Smith received his patents, the SW¼NE¼ of Section 28 was held in trust for the Tribes, and was not "public land" as defined in FLPMA, 43 U.S.C. §1702(e). By

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[18] In the 1942 Restoration Order, the Secretary did not distinguish between land in Section 28 that was open to settlement and land that was withdrawn. The Secretary classified all restored land "as undisposed of ceded land of the Wind River Reservation."

the Tenth Circuit's own analysis, land that was not "public land" when the patent was issued cannot be conveyed by the Secretary to facilitate the correction of the patent. The court's conclusion that land conditionally ceded under the 1905 Act, for which the Tribes were not compensated, was "public land", conflicts with this Court's decision in *Ash Sheep* and numerous lower court decisions, including decisions of the Tenth Circuit itself. This Court must alleviate the confusion created by the Tenth Circuit's decision.

III. THIS CASE DEMONSTRATES THE NEED FOR THIS COURT TO CONFIRM THAT THE SECRETARY'S AUTHORITY UNDER FLPMA DOES NOT AUTHORIZE PATENT CORRECTIONS THROUGH CONVEYANCES OF LAND THAT IS OWNED IN TRUST BY INDIANS OR OTHERWISE UNAVAILABLE FOR ENTRY

A. The Decision Disregards Congress' Expressed Determination That Decisions under FLPMA Shall Not Include or Affect Indian Land

The Tenth Circuit recognized that the SW¼NE¼ of Section 28 is held by the United States in trust for the Tribes. The court decided, nevertheless, that the Secretary could issue new patents to Foust conveying tribal trust land because the present status of the land is of no relevance in a patent correction proceeding under 43 U.S.C. §1746. The relevant inquiry is limited, according to the court, to the status of the land at the time of unlawful entry, and is not affected by the fact that the land was withdrawn from entry. App. at 6a. The analysis renders meaningless Congress' explicit decision to except "Indian lands" from FLPMA determinations. 43 U.S.C. §1702(e). It disregards the present trust status of the

land and ignores that the land was "Indian land" at the time Smith entered. *See* discussion, *supra*, at 21-24.[19]

Congress recognized in FLPMA that the authorized administrative conveyances and transfers of public land should not, and indeed could not apply to land that the United States holds in trust for the Indians. The restrictions on the alienation of Indian land discussed *supra* at 19-20, provide the backdrop for Congress' unequivocal exclusion of Indian lands from the FLPMA administrative process. The "Indian land" exception, by its terms, applies in every public land proceeding under FLPMA. The congressional mandate clearly was promulgated to prohibit the precise result reached by the Tenth Circuit: the alienation of land held for the benefit of Indians in a FLPMA proceeding.

The Tenth Circuit recognized that if it considered the present status of the SW¼NE¼ of Section 28, Foust could not obtain the correction he desired because the land is Indian land. *See* App. at 6a. To avoid FLPMA's statutory bar, the court decided that the inquiry under section 1746 was limited to the status of the land at the time of unlawful entry. There is no support in the statute or its legislative history for the court's narrow construction. Such a revisionist interpretation of FLPMA is in direct conflict with Congress' stated exclusion of Indian land from the statute. Ambiguities, if any, between the provision excepting Indian land from FLPMA determinations, 43 U.S.C. §1702(e), and the provision allowing patent corrections, 43 U.S.C. §1746, must be resolved in favor of the Tribes, especially when Congress has clearly excepted Indian land. As this Court recognized only eight days ago:

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[19] The United States has, without interruption, held the SW¼NE¼ of Section 28 in trust for the Tribes since the Wind River Indian Reservation was established in 1868. The Tribes never received compensation for the land under the 1905 Act, and it, therefore, remained "Indian land", held for their benefit until 1942, when the Tribes' full interest in the land was restored.

> when we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. [759,] 766 [(1985)]. See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. [164,] 174 [(1973)].

County of Yakima, et al. v. Confederated Tribes and Bands of the Yakima Indian Nation, Nos. 90-408 and 90-577, Slip. Op. at 16-17 (U.S. January 14, 1992).

The Tenth Circuit is equally bound by this "deeply rooted" principle. The court, therefore, cannot blithely assume, with absolutely no support in the statute or legislative history, that Congress intended to ignore present Indian title to land sought by a patent correction application. Such an interpretation makes a mockery of the statutory exception and frustrates the host of protections established to protect Indian land from alienation and the claims of squatters.

Not only is the Tenth Circuit's analysis contrary to the explicit statutory exception and fundamental principles of Indian law, in applying its analysis the court clearly reached the wrong conclusion. The SW¼NE¼ of Section 28 did not meet the statutory definition of "public land" at the time of the alleged error. *See* 43 U.S.C. §1702(e), App. at 80a. As previously discussed, the United States continued to hold the SW¼NE¼ in trust for the benefit of the Tribes, *see Ash Sheep v. U.S.*, 252 U.S. 165-66, at the time Smith entered. Until the land was sold, an event that *never* occurred, the land remained Indian land, not public land. *Id.* Even under the Tenth Circuit's narrow analysis, land that was "Indian land" at the time of the alleged error cannot be subject to a patent correction under FLPMA. The SW¼NE¼ of Section 28 is, therefore, unavailable to Foust whether the court considers the status of the land at the time of unlawful entry, when it was both "Indian land" *and* reserved from entry, or at the time of the patent correction application when it was "Indian land".

The Tenth Circuit's decision holds that under FLPMA Indian title may be extinguished for the benefit of squatters. Absent this Court's review and reversal, the Tenth Circuit's disregard for Congress' exception of "Indian land" from the FLPMA patent correction process threatens Indian title to all land held in trust for the benefit of Indians.[20]

B. The Decision Threatens the Finality of All Conveyances of Public Land

The court's interpretation threatens the settled expectations of each and every grantee and patentee of public land. If the decision is allowed to stand, the finality and certainty ascribed to withdrawals, grants and patents[21] will be destroyed, for each potentially will be subject to alteration if a patentee decides that his or her patent should have included neighboring land.

The potential cloud on the title of every patentee and grantee, and the potential incursion into land withdrawn for public purposes cannot be overlooked by this Court. FLPMA was enacted to provide for an orderly and comprehensive system of management on the *public lands*. *See* 43 U.S.C.

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[20] The history of land transactions described in this Petition is not unique to the Wind River Reservation. Numerous Indian reservations include large tracts of land that were opened to non-Indian settlement pursuant to agreements similar to the 1905 Act and later restored. The judicial decisions, discussed *supra* at 23, analyze similar conditional cessions and subsequent restorations on the Crow Reservation in Montana, the Coeur d'Alene Reservation in Idaho, and the Ute Reservation in Utah. Similar agreements were commonly entered on reservations throughout the west in the early 1900s. *See e.g.*, III Kappler, *Indian Affairs, Laws and Treaties*, at 163 (Colville Indian Reservation), 167 (Lower Brule Indian Reservation), 307 (Rosebud Indian Reservation) (1913).

[21] *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, 638 (1882) (finding that it is the "unassailable character [of a patent] which gives to it its chief, indeed, its only value, as a means of quieting its possession in the enjoyment of the lands it embraces.")

§1701. Its provisions clearly do not extend to land that does not meet the definition of "public land". Moreover, its provisions cannot become a mechanism by which a purchaser of a patent brings into question title to non-public land. This Court cannot allow to stand a decision of the Tenth Circuit that extends the Secretary's authority under FLPMA to each and every parcel of land that was at one time public land.

C. Patent Corrections Only Extend to Mistakes of Fact, Not, as in This Case, Mistakes of Law

Smith unlawfully settled on land that was withdrawn from entry and remained withdrawn until it was restored to the Tribes in 1942. Smith's error was not an error of fact – it was an error of law. Section 316 of FLPMA does not provide his successor-in-interest with a remedy for that legal mistake.

The implementing regulations explain the errors subject to correction under section 316:

> *Error* means the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of *factual error. This term is limited to mistakes of fact and not of law.*

43 C.F.R. 1865.0-5(b) (1990) (emphasis added). Patent corrections are permitted only when an applicant *clearly* establishes that an error, in fact, was made in describing the patented lands. *Ben R. Williams*, 57 IBLA 8 (1981), *citing George Val Snow*, 46 IBLA 101 (1980). The IBLA found that "Foust had not, and indeed could not, show that the patents in question suffered from a mistake of fact." App. at 21a. It based its finding on the facts that: (1) the land descriptions in Smith's application for patents were indistinguishable from the land legally patented and were devoid of any mention of "the draw" unique to the SW¼NE¼ of Section 28; (2) Smith clearly stated that he built on the NE¼SE¼, which does not

share a common boundary with the SW¼NE¼ of Section 28; and (3) there could not have been a mistake because, if Smith had correctly described the SW¼NE¼ of Section 28, which was never open to settlement, his patent application would have been denied. App. at 43a to 47a.

As the District Court found in upholding the IBLA decision:

> The mistake theory plaintiff propounds is simply unsupportable. So many facts and circumstances surrounding Smith and his applications exist, only some of which have been addressed above, that a conclusion of mistaken description would stretch the benefit of doubt to the breaking point.

App. at 30a.

Even had Smith been mistaken as to the description of the land he entered, as the Tenth Circuit found, the court cannot overcome the fact that Smith's entry was unlawful: he neither initiated nor accomplished the legal steps necessary to correct that error. *See* Section 24, Federal Power Act; *Lee v. U.S.*, 22 Cl.Ct. at 465-66. Foust cannot now rely on FLPMA's patent correction provision to circumvent the legal procedures ignored by his predecessor Smith. Foust, moreover, failed to exercise reasonable diligence in attempting to confirm that the land that he purchased included the improvements built by Smith. *See* App. at 12a, 30a-31a and 47a. He cannot now rely on FLPMA's patent correction provision to improve his position.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 22, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 90-8004

OLIVER J. FOUST,

Plaintiff-Appellant,

v.

MANUEL LUJAN, JR.,
Secretary of The Interior,

Defendant-Appellee,

NORTHERN ARAPAHO AND
SHOSHONE INDIAN TRIBES OF THE
WIND RIVER INDIAN RESERVATION,

Defendants/Intervenors-Appellees.

Appeal from the United States District Court
for the District of Wyoming

Decided Aug. 14, 1991

Before MCKAY, SETH, and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff Oliver Foust applied, pursuant to § 316 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1746, to correct an error in a land patent issued by the United States to Byron Smith, his predecessor in title. The Bureau of Land Management (BLM) approved Foust's application, and intervenors-defendants the Northern Arapaho and Shoshone Indian Tribes (Indians) appealed. The Interior Board of Land Appeals (IBLA) reversed the BLM's decision, and the district court upheld the reversal. Foust now appeals.

The land at issue is within Section 28, T. 6N., R. 6E., Wind River Meridian, Wyoming, which was part of a federal reserved water power site at the time the United States issued the patent to Smith. In 1929 and 1930, Smith filed homestead entry applications for the NE¼SE¼ and lots 4 and 5. His applications were denied initially but then granted after he appealed. In 1935, Smith filed a final proof for his entries onto these three lots, listing his improvements as follows: a house, double garage and other buildings on the NE¼SE¼; a house, garage, and cellar on lot 4; and a fenced garden on lot 5. In 1936, the United States issued to Smith patents for the NE¼SE¼ and lots 4 and 5.

In 1942, the United States restored all undisposed land within Section 28, T. 6N., R. 6E., to the ownership of the Northern Arapaho and Shoshone Indian Tribes of the Wind River Reservation. In 1963, Smith's widow conveyed the NE¼SE¼ and lots 4 and 5 to Foust by warranty deed. A 1979 resurvey of the area showed that the buildings that Smith had built and indicated as being on the NE¼SE¼ were, in actuality, located within the SW¼

NE¼. Foust applied for a patent correction in 1982, ultimately proposing to deed back the NE¼SE¼ and lot 5 to the United States in exchange for roughly equal acreage on which the buildings are actually located. The Indians, who have title to the SW¼NE¼, filed an action in the district court to nullify the patents, which was dismissed without prejudice to enable the patent correction proceedings to continue.

Foust argues that because of the difficulty in surveying the mountainous terrain and ascertaining lot boundaries, both the United States and Smith believed that the land on which Smith built was within the boundaries of the lots conveyed by the patents. Foust contends that this mutual mistake of fact can be corrected under 43 U.S.C. § 1746. The IBLA and the district court rejected Foust's arguments on several alternative grounds: 1) the land on which Smith built, SW¼NE¼, was not open to entry at the time the patents were issued and therefore cannot be subject to a patent correction under 43 U.S.C. § 1746; 2) Foust did not prove that a mistake of fact was made in granting him the NE¼SE¼ and lots 4 and 5; and 3) the equities of the case support a ruling for the Indians. *See Shoshone and Arapahoe Tribes,* 102 IBLA 256 (1988), I R. tab 1, Ex. B; Order Affirming Decision of the Interior Board of Land Appeals (D. Wyo. Nov. 13, 1989) (hereinafter "Order of Nov. 13, 1989"), I R. tab 33.

We review the IBLA's decision to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or is "unsupported by substantial evidence. . . . " 5 U.S.C. § 706(2)(A) & (E).

> "Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' "

Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Under the "substantial evidence" test, our inquiry is whether the agency's decision is based on " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This is something more than a mere scintilla but something less than the weight of the evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo*, 383 U.S. at 620. " 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' " *Bowman Transp.*, 419 U.S. at 284 n.2 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

I

We consider first whether 43 U.S.C. § 1746 permits a patent correction involving an exchange of the SW¼ NE¼ for other lots to which Foust has title. The statute provides:

> "The Secretary [of Interior] may correct patents or documents of conveyance . . . relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands."

43 U.S.C. § 1746. The IBLA and the district court found that § 1746 does not allow what Foust proposes, because the SW¼NE¼ had been withdrawn from homestead entry for the purpose of a power reserve at the time the patents were issued. The district court acknowledged Foust's argument that Congress amended FLPMA in 1976 to remove language requiring that patent corrections be based on the land's availability for entry. *Compare* 43 U.S.C. § 697 (1964) *with* 43 U.S.C. § 1746 (1982). However, the court found the deletion of the entry language to be ambiguous and interpreted it to be "part of a concerted effort to simplify public land administration while retaining the basic precepts of public land law." Order of Nov. 13, 1989, at 18. We disagree.

The meaning of the congressional amendment deleting the entry language is clear: the statute no longer requires the land's availability for entry to correct a patent. We will not speculate as to what Congress might have intended, because no ambiguity exists. If Congress had intended something more subtle, it surely would have substituted language, rather than entirely deleting it. Furthermore, nothing in the legislative history supports the district court's analysis of congressional intent. *See id.* at 1718 (legislative history fails to show why the entry language was deleted). A finding that the Secretary

of Interior (Secretary) cannot correct a patent to include lands that were not subject to entry by the original patentee is not in accordance with the law.

We are similarly unpersuaded by the Indians' argument that the Secretary cannot correct a patent when doing so would require conveyance of tribal land. We agree that lands now held by the United States in trust for Indians are not public lands.. [sic] *See* 43 U.S.C. § 1702(e). The relevant inquiry, however, is whether the lands in question were public lands at the time the patent was issued. The lot in question here, the SW¼NE¼, was owned by the United States, administered by the Secretary, and not held in trust for the Indians in 1936, and it therefore was public land under the statutory definition. *See id.*

We believe the Secretary's fiduciary duty to the Indians does not prevent him from correcting a patent to land that was public at the time the patent was issued and the alleged mistake made. If the responsible officers of the United States believed that the land on which Smith had built and claimed was the land described in the patent, and that the United States had already conveyed that land, the Congress could not have intended to restore that same land to the Indians in 1942. Thus, the Indians took the land subject to any mistaken description resulting from boundary uncertainties. The fact that the Secretary is vested with responsibilities both to correct patent errors and to act as trustee for the Indians cannot operate against patentees who have Indians, rather than non-Indians, as neighbors. We hold that the SW¼NE¼ is subject to the patent correction mechanism of 43 U.S.C. § 1746.

II

The IBLA found, and the district court agreed, that Foust failed to prove that Smith's patent contained an error. Our inquiry is limited to whether this determination is supported by substantial evidence, 5 U.S.C. § 706(2)(E), in light of the entire administrative record, *see Bowman Transp.*, 419 U.S. at 284 n.2; *Roberts v. Morton*, 549 F.2d 158, 160 (10th Cir. 1976), *cert. denied*, 434 U.S. 834 (1977). Errors in patents are defined as:

> "the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law."

43 C.F.R. § 1865.0-5(b). If both the United States and Smith intended that the land on which Smith built be conveyed to him but were mistaken about the boundaries or legal description, this would be a correctable mistake of fact.

Foust argues that the IBLA and district court ignored overwhelming evidence of this mutual mistake of fact. We agree. First, the topography of the area is such that ascertaining correct lot boundaries would have been difficult. Smith built in a small canyon among steep, rocky slopes and cliffs. It was not until 1979, when the area was resurveyed by modern surveying standards, that anyone was able to determine with certainty that the entry had been made on the $SW^1/_4NE^1/_4$, rather than the $NE^1/_4SE^1/_4$. Second, the $SW^1/_4NE^1/_4$ was the only place that was not

too steep to build a house. This fact alone is not enough to convince us that the United States intended to convey the land on which Smith built, but it does raise questions about why Smith would have filed a homestead application, and why the United States would have issued a patent, for land that was too steep for a home.

Third, on several separate forms, Smith referred to the $NE^1/_4SE^1/_4$ but clearly described the $SW^1/_4NE^1/_4$. In his December 3, 1929, petition for designation of the $NE^1/_4$ $SE^1/_4$ for stock-raising homestead entry, Smith described the lot as having "one small permanent spring," IIA R. Petition for Designation Stock-raising Homestead Law; the spring is located on the $SW^1/_4NE^1/_4$. In the testimony of claimant form, filed August 30, 1935, for his final proof, he stated that he had built a house, double garage, and other buildings on the $NE^1/_4SE^1/_4$. His non-water reserve affidavit, filed December 3, 1929, and his application for reduction of the required area of cultivation, dated September 11, 1935, referred to a spring being located on the $NE^1/_4SE^1/_4$.

Witnesses also mistakenly assumed that the land on which Smith built was the $NE^1/_4SE^1/_4$. His final proof of homestead included the affidavits of two witnesses, who stated that Smith had built a dwelling and garage on the $NE^1/_4SE^1/_4$. One affiant had been familiar with the land for seven years and had visited the Smith home about twenty-five times; the other had been familiar with the land for twenty years and had visited the Smith home at least four times per year. Foust also presented with his application for patent correction the affidavit of Bonnie Bleak, who has lived near the land in question since Smith entered and built on it. She attested to her good

faith belief that the improvements were on the lands described in the patents.

Finally, and most significantly, the responsible officials of the United States erroneously believed that Smith had built on the NE¼SE¼. Because of a protest against Smith's entry, the General Land Office would not issue the patent until a special agent for the Department of Interior conducted a field investigation and determined that Smith had resided on the land he claimed he had entered. The special agent inspected the land and recommended granting Smith the patent to the NE¼SE¼ (as well as lots 4 and 5) because of his residence on the land. In his Favorable Report of November 18, 1935, the special agent described the NE¼SE¼ as "extremely rough and rocky, containing scattered scrub cedars not commercially valuable and two small springs sufficient for domestic use. . . . There is on the original entry [the NE¼SE¼] a stone and log house, double garage, storeroom, and frame bath house, having a reasonable value of $2,300.00." IIA R. Favorable Report. The description matches the land that has since been discovered to be the SW¼NE¼. The United States would not have issued a patent for the NE¼SE¼ unless the officials responsible for investigating and issuing the patent were satisfied that Smith had entered the lot and was residing on it. Therefore, the United States erroneously described the lot that it intended to convey.

The IBLA and the district court found that Foust had not met his burden of proving a mutual mistake based on three sets of facts: (1) Smith's description of the lands he sought as "rough," "broken," and "uneven"; (2) the lack of an adjoining boundary between the NE¼SE¼ and the

SW¼NE¼; and (3) the location of the SW¼NE¼ within a powersite withdrawal and thus unavailable for entry. Nothing about the description of the land as rough, mountainous, uneven, and rocky is inconsistent with the mistake of fact that Foust alleges. The SW¼NE¼ is apparently rough and rocky; just because it is less so than the NE¼SE¼ does not mean that Smith or the United States were describing anything other than the land on which Smith built. In fact, the Department of Interior's special agent, at the time he investigated Smith's entry, described the NE¼SE¼ as being "extremely rough and rocky" and as containing a house, double garage, and other improvements that were later discovered to be on the SW¼NE¼. IIA R. Favorable Report. Viewing Smith's descriptions in context, it is apparent that he was concerned that he would be required to cultivate this rocky, uneven land in order to receive the patent. His failure to note that there was enough even ground to build a house cannot be fatal, especially when the special agent who inspected the land used similar descriptive terms.

The lack of a common boundary between the NE¼ SE¼ and the SW¼NE¼ does raise a question about how the mistake could have been made. The two pieces of land touch only at one corner. The difficulty of surveying the area at the time because of the rough and steep topography could account for everyone's mistaken belief that Smith had built on the NE¼SE¼. Regardless of the reason, the lack of an adjoining border cannot overcome the overwhelming evidence that both Smith and the United States referred to the NE¼SE¼ but described the

SW¼NE¼. *See Bowman Transp.*, 419 U.S. at 284 n.2. (evidence in administrative record detracting from weight of evidence on which agency makes decision).

The availability of the SW½NE¼ for entry at the time is irrelevant. The United States believed that the land on which Smith had built was part of the NE¼SE¼, land available for homesteading. The fact that the United States might not have conveyed this land if it had known its true description does not mean that the United States did not make a correctable mistake. The record shows that the United States intended to convey the land that Smith entered and improved. Accordingly, the IBLA's determination was not based on substantial evidence.

III

"Once the fact of error in the patent is established, the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent." *Ben R. Williams*, 57 IBLA 8, 13 (1981). The IBLA found that Foust was not entitled to relief as a matter of equity, because he failed to survey the land at the time he purchased the property and because the Bureau of Indian Affairs (BIA) opposed the patent correction as detrimental to the Indians' interests. The district court affirmed on the same grounds. We review under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A).

Foust presents several equitable considerations in his favor. He is elderly, widowed, and living on the land in question. He has lived there for twenty-eight years, paid the taxes, maintained the property, and made further

improvements. He would suffer severe economic hardship if he were to lose his home.

Foust asserts that he made a title search before purchasing the property but admits that he did not have the property surveyed. However, there is no apparent reason why he should have been on notice that the property required a survey. The original entryman Smith and his wife, who sold the land to Foust in 1963, believed that the lot with the house, other improvements, and stream was the NE¼SE¼. So did the government and nearby residents. In fact, no one suspected the mistake until 1969, and the mistake could not be confirmed until an extensive resurvey in 1979.

Foust was a good faith purchaser, apparently paying full value for the land. Although he could have been more diligent by having the land surveyed, under the circumstances we do not believe he should lose the land just because he relied on the representations of the one who conveyed to him and on the other information that he did obtain. It is too much to expect every purchaser to resurvey on the chance that a patent issued decades before might have misdescribed the land.

The BIA's opposition to the patent correction, while a relevant consideration, is also insufficient under the circumstances to prevent the correction. The correction would involve an exchange of land roughly equal in acreage, thus not diminishing the overall number of acres in the Wind River Reservation. Although the SW¼NE¼ quite likely is more valuable than the land the Indians would receive in return, the Indians have presented no evidence of a difference in land values or of any other

harm. A win for the Indians would appear to be a windfall to the extent of the excess value of the improvements. Furthermore, the Indians took no action with respect to the land until the early 1980s, some fifty years after Smith entered the land and nearly forty years after the remaining undisposed land in the area was conveyed to them. Although adverse possession does not run against the Indians, their failure to take some action against the alleged trespass for nearly forty years is a relevant consideration in evaluating the equities of the case. If they did not know that Smith had built on land for which he did not have a patent, this would strongly suggest that they were under the same mistaken assumptions about lot boundaries that were held by the United States, Smith, Foust, and the other area residents. On the other hand, if they did know of the mistake but did nothing about it, they did not value the $SW^1/_4NE^1/_4$ highly enough to protect their property rights; they cannot assert now that the land is so valuable that an exchange would prejudice their interests.

Because of the severe hardship that Foust would face if he were to lose his home and the insufficiency of the factors on which the IBLA relied, we hold that the IBLA made a clear error of judgment in finding that Foust was not entitled to relief as a matter of equity. The determination was arbitrary and capricious. *See Bowman Transp.*, 419 U.S. at 285.

REVERSED.

McKAY, Circuit Judge, dissenting:

Had I been the Interior Board of Land Appeals (IBLA), I would have weighed the facts largely as the majority has done. Because our commission does not give us the weighing function, we are not at liberty to do what the majority has done. For that reason I must respectfully dissent.

While I agree with the majority that 43 U.S.C. § 1746 provides statutory authority to reform the deed at issue, I believe that the majority has clearly undervalued the facts and judgments the IBLA relied on and overvalued its own view of the facts. The trial court's summary of the facts which support the IBLA's discretionary decision adequately demonstrates my point. I set it out here *in haec verba*, omitting only two introductory paragraphs and the judgment paragraph:

[Judge McKay's recitation of the District Court's opinion has been deleted. It is set out in its entirety in App. B, beginning at 15a.]

* * *

I add only these two observations. The reason for the grossly erroneous description by the original entryman who was otherwise so fulsome in description seems patent: the correct quarter section description would not have been open to entry. Finally, to argue that the tribe has presented no evidence of a difference in land values is refuted by the court's own earlier recitation of why the original entryman chose the site in issue.

I would affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
No. C88-235-K

OLIVER J. FOUST,
Plaintiff,
vs.
MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,
Defendant,
and
NORTHERN ARAPAHOE AND
SHOSHONE INDIAN TRIBES OF THE
WIND RIVER INDIAN RESERVATION,
Defendants-In-Intervention.

ORDER AFFIRMING DECISION OF THE INTERIOR BOARD OF LAND APPEALS (WITH FINDINGS)

The above-entitled matter having come on regularly for hearing before the Court upon appeal from a decision of the Interior Board of Land Appeals (IBLA) reversing the decision of the Bureau of Land Management (BLM) and finding plaintiff not entitled to patent corrections; plaintiff appearing by and through his attorney, John R. Hursh; defendant Manuel Lujan, Jr. appearing by and through his attorney, David A. Kubicheck, Assistant United States Attorney for the District of Wyoming; defendants-in-intervention appearing by and through their attorney, Dale T. White; and the Court having heard the arguments of counsel and having fully and carefully

reviewed and considered the briefs filed herein, the administrative record and all matters pertinent thereto, and being fully advised in the premises, FINDS:

This dispute centers around patents to certain lands located within an Indian reservation. With a final decision from the responsible federal agency having been rendered, the Court has jurisdiction of this appeal pursuant to 5 U.S.C. §§ 702, 704. Venue is proper under 28 U.S.C. § 1391(e). Plaintiff, successor-in-interest to the original patentee, seeks a patent correction to include some tribal lands. Before reaching the merits, a detailed recitation of the facts is necessary.

The Wind River Indian Reservation, encompassing over 2,000,000 acres in west central Wyoming, was established by treaty between the United States and the Eastern Band of the Shoshone Indians, represented by Chief Washakie and others, on July 3, 1868 at Fort Bridger, Utah Territory. Amidst hopes for peace between the Indians and the whites following an especially violent time in our nation's history, the United States gave back to the Indians in the form of reservations acreage which at best represents a mere fraction of the lands once populated by the Indians. Since the 1868 treaty, the Arapahoes have shared the reservation with the Shoshones. *See Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).

By the turn of the century, the Shoshone and Arapahoe Indians ceded a portion of the Wind River Indian Reservation to the United States as evidenced by an act of Congress. *See* Pub.L. 58-185, March 3, 1905, 33 Stat. 1016. On July 2, 1910, certain of the reservation lands were withdrawn by executive order and reserved for water

power sites. Plantiff's [sic] Exhs. 59, 60. Included in the withdrawal and reservation was a tract described as Section 28, T. 6N., R. 6E., Wind River Meridian (W.R.M.) – the tract which contains the lands at issue at the administrative level and here. Plaintiff's Exh. 59, p.3. On November 12, 1927, a survey plat for the above-described township was approved and apparently filed on October 5, 1928. Plaintiff's Exhs. 9, 62. Before the year was out, the lands shown in the survey plat were opened to homestead entry.

On December 9, 1929, one Byron H. Smith filed a petition for designation of the NE¼SE¼ of Section 28, T. 6N., R. 6E., W.R.M. as stock raising lands, along with an application, serialized by the Cheyenne land office as 050733, for entry onto that parcel. Plaintiff's Exhs. 42, 43. Smith's petition was denied with the explanation that the land was not subject to homestead entry under the Act of March 3, 1905. On December 15, 1929, Smith appealed the denial and eventually prevailed. Plaintiff's Exhs. 45, 50.

On July 9, 1930 Smith filed a supplemental homestead entry application C-050733 for the NE¼SE¼ set out above. Later, he filed a petition/application C-051835 for stock raising homestead entry onto lots 4 and 5 (see appendix) of Section 28, T. 6N., R. 6E., W.R.M., which lots adjoin the NE¼SE¼. *See* A.R. Part 2. On August 29, 1930, lots 4 and 5, previously withdrawn for power sites, were restored to entry pursuant to section 24 of the Federal Power Act (FPA), as amended, 16 U.S.C. § 818 (1982). Plaintiff's Exh. 58. By October 4, 1930, Smith had filed for designation of lots 4 and 5 as stock raising homestead lands. Plaintiff's Exh. 34. Smith filed a final proof for entries C-050733 and C-051835 on September 3, 1935,

listing the improvements made to these lands, to-wit: a house, double garage, and other buildings on the NE¼SE ¼, a house, garage, and cellar on lot 4, and a fenced garden on lot 5. Plaintiff's Exh. 35 at ¶ 12(a). In November 1936, Smith received patents for lots 4 and 5 and the NE¼SE¼. Plaintiff's Exhs. 31, 32. In 1942, all undisposed ceded land east of the Big Horn River (Wind River) and within Section 28, T. 6N., R. 6E. became tribal land.

Plaintiff Foust entered the picture on June 19, 1963 when he and his now deceased wife received title to lots 4 and 5 and the NE¼SE¼ by warranty deed from Smith's widow. Plaintiff's Exh. 7. The Fousts, in turn, conveyed a part of lot 4 to Erwin and Donna Roberts by warranty deed on May 4, 1979. Plaintiff's Exh. 78.

Problems began to arise shortly after Foust obtained the lands. The Bureau of Indian Affairs (BIA), in 1968 or 1969, suspected that Foust's home and the other improvements were located on tribal lands and asked that the BLM perform an official survey. Between October and November 1979, a resurvey of the subject plat was undertaken resulting in the redesignation of the S½NE¼ of Section 28, T. 6N., R. 6E., W.R.M. as lots 9, 10, 11, and 12. The resurvey revealed that the house and other buildings Smith had built and indicated as being on the NE¼SE¼ were, in actuality, located within the SW¼NE¼ on lot 11.[1] Various options to remedy the trespass were

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[1] Aside from the trespass question, the significance of this discovery lies in the fact that at the time Smith built his home and other improvements, the area now designated as lot 11 was still reserved as a powersite and had not been restored to entry.

advanced by Foust and the Government, including such proposals as exchanges of land, payments of past rentals, and entering into a lessor-lessee arrangement with the tribes. None were deemed acceptable. So the Fousts applied to the BLM for a patent correction on May 3, 1982 whereby lot 5 would be deeded back to the United States in exchange for lots 9, 11, and 12, a quantitatively similar transaction. A.R. Part 3. (Plaintiff's Exh. 20). The tribes subsequently sought declaratory relief in this Court to nullify the patents, an action which was later dismissed in order to enable patent correction proceedings to continue at the administrative level. *See* Plaintiff's Exhs. 2, 3.

On December 30, 1985, the BLM issued a decision approving Foust's application for correction. A.R. Part 4 (Plaintiff's Exh. 28). The tribes appealed and obtained a reversal from the IBLA in a lengthy decision authored by Administrative Law Judge (ALJ) Franklin Arness. Plaintiff's Exh. 1. Foust now appeals the IBLA decision to this Court, contending that the agency action was arbitrary and capricious.

Under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, the scope of judicial review of final agency action is a very deferential one whereby a reviewing court can set aside agency action which is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . " 5 U.S.C. § 706(2)(A) (1982). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) and *Edwards v. Califano*, 619 F.2d 865 (10th Cir. 1980). This narrow standard of review requires the Court to ascertain whether the agency based its decision on relevant factors or whether it made a clear error of judgment. *Bowman Transportation, Inc. v. Arkansas-*

Best Freight System, Inc., 419 U.S. 281 (1974), *reh'g denied*, 420 U.S. 956 (1975).

A reviewing court may also set aside an agency decision it finds to be unsupported by substantial evidence in the record. 5 U.S.C. § 706(2)(E) (1982). Substantial evidence means " 'more than a mere scintilla' "; it is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While it is permissible for a court to engage in substantial inquiry into the facts, absent clear error, it must be wary to substitute its judgment for that of an expert agency. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 238 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) and *New Mexico Environmental Imp. Div. v. Thomas*, 789 F.2d 825, 835 (10th Cir. 1986).

Section 316 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1746, gives the Secretary of the Interior (Secretary) the authority, in permissive terms, to "correct patents or documents of conveyance . . . relating to the disposal of public lands where necessary in order to eliminate errors." A further regulatory provision explains the errors subject to correction:

> 'Error' means the inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual

> error. *This term is limited to mistakes of fact and not of law.*

43 C.F.R. § 1865.0-5(b) (1988) (emphasis added).

Although the BLM found that circumstances warranted a patent correction, the IBLA was not so easily convinced. It found that Foust had not, and indeed could not, show that the patents in question suffered from a mistake of fact. The IBLA reviewed Smith's petitions and applications for the NE¼SE¼ and lots 4 and 5 and the descriptions he gave for these lands and concluded that Smith's descriptions fit the lands contained in his patents. They could not have referred to what is now lot 11, colloquially known as the "draw," since this small parcel is the only area within Section 28 flat enough to support a homestead.

Another inconsistency militating against a factual mistake, in the view of the IBLA, came from a statement of Foust to the effect that Smith intended to build his homestead on lot 5. Such a statement, the IBLA found, was simply incongruous to Smith's own written submissions describing the house and other improvements as being situated on the NE¼SE¼, not on lot 5. With that the case, the relative locations of the SW¼NE¼, which contains lots 9, 11, and 12, and the NE¼SE¼, touching as they do at one corner and not sharing any common boundaries, made it that much more unlikely, as far as the IBLA panel was concerned, that a mistaken description was involved.

Then came the area of land in which lot 11 is located, the SW¼NE¼. As the IBLA observed, the SW¼NE¼

was withdrawn from entry for power site purposes during all pertinent periods and remained so until its restoration to tribal ownership in 1942. Had Smith applied for entry onto what is now lot 11, the IBLA points out, no patent would have issued for this reason.[2] This fact alone, in the words of ALJ Arness, "negates entirely the possibility that a mistake was made in the description of the patented land." *Shoshone and Arapahoe Tribes*, 102 IBLA at 256, 268 (May 23, 1988) (footnote omitted).

With the law against Foust, the IBLA turned to a consideration of the equities. It concluded that equity was not on Foust's side because he did not exercise due diligence in verifying the correctness of the property being conveyed to him. When Foust was in the process of acquiring the lands, he asked about a survey and apparently was told that no reliable survey was available given the terrain. This, according to the IBLA, should have alerted Foust that problems with description might be present. Influential to the IBLA was the fact that a BIA range conservationist had discovered the trespass after an aerial overview as early as 1968, an event which led to a dependent resurvey in 1980 after a somewhat unusual delay in notifying the tribes of the suspected trespass. Any argument that discovery of the trespass was impossible prior to this resurvey was discounted by the IBLA. In the words of ALJ Arness:

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[2] Foust disputes this, regarding the withdrawal status of the $SW^1/_4NE^1/_4$ as a minor impediment which, upon application for entry, would have been removed as a matter of routine. As explained in greater detail below, this position is entirely unpersuasive.

> Both the 1928 homestead opening and powersite withdrawal were described by reference to the 1928 survey, which was available both to Smith and Foust. The 1928 survey shows the lots and quarter quarters of sec. 28 and the general topography of the land. The 1928 survey also shows the draw where Smith built, and it shows that the draw was not within the land patented to Smith, but that it was located instead within the powersite withdrawal in the $SW^1/_4NE^1/_4$. *The BIA range conservationist who detected the trespass did not need to leave his office to see that there was a trespass.*

102 IBLA at 271 (emphasis added).

On appeal, Foust maintains that the IBLA misapplied the law by ignoring the corrective mechanism of the FLPMA. Plaintiff's basic argument revolves around the FPA, 16 U.S.C. § 818, which provides for entry onto withdrawn lands upon a determination of the Federal Power Commission (FPC) that the value of the reserved lands for powersite purposes will not be diminished if location is permitted. Under § 818, the Secretary is given no alternative but to open lands so determined to entry under any terms imposed by the FPC. Plaintiff treats this process as a mere formality, arguing that had Smith filed an application for entry onto lot 11, the § 818 determination would have been made as a matter of course as evidenced by the many similar determinations the FPC has made for other homesteaders in the region. Moreover, to allow a decision regarding an application for patent correction to turn upon the availability for entry of the land sought to be included at the time such entry was made, as the IBLA did, especially when placed in the

light of § 1746, amended as it was to exclude previous language requiring consideration of the status of the land, is clearly erroneous insists Foust.

Plaintiff maintains that Smith mistakenly described the land upon which he built his home and other buildings. Anyone who looks at the lay of the land, says Foust, will see that lot 11 is the only parcel in close proximity to the patented lands which is unencumbered by rocky, mountainous terrain and cliffs and thus suitable for building purposes. As further support for the mistake theory, Foust points to: (1) sworn statements of subscribing witnesses who live and have grown up in the canyon, relating their beliefs that Smith's improvements were on lots 4 and 5; (2) an abstract of title, given to Foust, wherein the Smith improvements are described as being on lots 4 and 5; (3) BLM and General Land Office worksheets showing the improvements as being on lots 4 and 5; and (4) the warranty deed to Foust as well as his affidavit to the effect that Smith's widow told him the improvements were located on lot 5.

Aside from all this, the plaintiff argues that the equities are with him. According to Foust, who has lived on the disputed lot for over 25 years, the only reason the tribes are pursuing what will amount to an ejectment action if they prevail, is out of vindictiveness for Foust's sale of a portion of lot 4 to a non-Indian who offered a higher price than the tribes did. This bad faith theory, believes Foust, is supported by the fact that no other entrymen on lands which were subject to the powersite reservation in the canyon area have had their claims challenged by the tribes.

The United States and the tribes rely on the 1942 restoration order which gave back to the Indians all lands opened under the 1905 Act and undisposed of. This included the SW¼NE¼ – lots 9, 11, and 12. So, if Smith had described lot 11 in his application, a patent would have been denied. More than twenty years after this restoration, Foust purchased the Smith property. Had plaintiff exercised due diligence in ascertaining the propriety of the conveyance, urge these parties, the discrepancy would have been readily discovered.

As for plaintiff's mistake theory, the United States and the tribes simply point to statements of Smith which describe the subject improvements as being on the NE¼ SE¼. Other indicia negating this theory include Smith's descriptions of the patented lands as "rough," "rocky," "very hilly," and "very mountainous" as well as the stockraising designation he sought for lots 4 and 5 when, according to a range conservationist, section 28 contains very little grass and no access to suitable open range land in other sections. Rather, the tribes allege, Smith built on lot 11 when he saw the desirability of the land for a scenic home.

The tribes remind the Court that the equities are not with the plaintiff, principally because he failed to exercise reasonable diligence before purchasing from Smith's widow. Foust could have easily performed the necessary verification but chose not to. Other relevant equity considerations advanced by the Indians include length of residence on the land and expenditures to acquire and improve it, factors which would weigh heavily in favor of the original patentee Smith or his heirs but not an arms-length transferee like plaintiff.

The United States holds tribal lands in trust for the Indians. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368 (1968). *See also Manygoats v. Kleppe*, 558 F.2d 556, 557 (10th Cir. 1977). The BIA is charged with carrying out this trust obligation. *Poafpybitty*, 390 U.S. at 374. So strong is our commitment to protect Indian lands that whenever a dispute develops between a white person and an Indian over lands where an Indian presumption of title has been established, it is the white person who shoulders the burden of persuasion and the burden of producing evidence to the contrary. 25 U.S.C. § 194. *See also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979). Such provision was seen as a means of preventing non-Indian squatters from setting up residence on tribal lands. *Id.* at 667.

Whether or not Smith was a squatter is left for history. All that can be said is that Smith received patents to certain lands. A government patent is the most accredited type of conveyance known to the law. *United States v. Cherokee Nation*, 474 F.2d 628, 634 n.16 (Ct.Cl. 1973). Only the lands set forth in a patent pass to an entryman; nothing passes by implication. *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969). As set out above, Smith received patents for lots 4, 5, and the NE¼SE¼ – nothing more, nothing less. Yet he built a home and other improvements on land not designated in the patent – land withdrawn from entry at the time and later tribal land, not public land.

Notwithstanding this, plaintiff, as Smith's successor-in-interest, asks this Court to allow the patents to be corrected, giving him rights to a parcel of land which Smith, as the original patentee, had no right to in the first

place not only because of its absence in the patent documents but also by virtue of the reserved status of the SW ¼NE¼ at the time of Smith's entry. Foust's argument to the effect that the IBLA misapplied § 1746 of the FLPMA is for naught. Likewise, the after-the-fact justification for Smith's intrusion, namely that had he applied for entry onto the then withdrawn SW¼NE¼, the application would have been granted as a matter of routine following the § 818 determination is unpersuasive. The fact of the matter remains that Smith never made any inroads in that direction but, more importantly, no evidence before this Court supports plaintiff's assertion regarding the frequency with which applications for entry onto withdrawn lands are approved. Moreover, approval of applications for entry under § 818 are not as quick as plaintiff would seem to suggest. Under § 818, following the notice of determination of no injury, the Secretary is required to give the governor of the state within which the lands sought to be entered are located ninety days from the date of such notice to determine whether the land should be reserved to the state rather than approved for entry by a private person. At any rate, "[a] patent cannot convey what has been reserved by law." *Leo Sheep Co. v. United States*, 570 F.2d 881, 888 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979).

Admittedly, plaintiff's point regarding the difference between § 1746 of the FLPMA and its predecessor, primarily from the standpoint of the excision of language where the decision on whether to approve a request for a patent correction turned on the availability of the land sought to be included for entry, deserves closer attention. Although the legislative history is silent as to why the

prior language was deleted, the 1976 amendments to the FLPMA were a response to calls for the modernization of the nation's public land laws, many of which were regarded as obsolete. 1976 U.S. Code Cong. & Admin. News 6175. While on-the-record clarification by Congress would have been helpful to disposition of this issue, the lack of such elaboration is not fatal because any ambiguity in a statute is interpreted in favor of the Indians whenever Indian treaty rights or nontreaty matters involving Indians are at stake. *Equal Employment Opportunity Commission v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989). The Court views the deletion of the entry language from § 1746 as part of a concerted effort to simplify public land administration while retaining the basic precepts of public land law.

Were the Court to sanction plaintiff's interpretation of § 1746, the question of availability of entry would become irrelevant, conceivably threatening all lands in the public domain. Such wholesale exploitation of the purposes behind the public land laws and, more particularly, the trust status of Indian lands was not intended by Congress.

Foust cannot be regarded as a bona fide purchaser under the circumstances of this case. When told that no reliable survey of the area was available, a reasonable person would have exercised diligence in attempting to ascertain the propriety of his purchase. As shown above, the pertinent materials which would have disclosed the defect in the conveyance were available at the time of and before Foust's purchase, but he chose not to pursue the matter.

His reliance on a prior IBLA decision, *Mantle Ranch Corp.*, 47 IBLA 17 (April 11, 1980). as supportive of a patent correction is misplaced; for, in that case, the successors-in-interest were heirs to the original patentee who mistakenly described the lands entered. All concerned agencies expressed their approval of the correction sought. The IBLA described the equities thus:

> Not only has the land been occupied and claimed since 1919, the tract in sec. 17 has actually been the site of the family home for more than 40 years and is the place where Tim Mantle, the present occupant, was born. The heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law.

Id. at 38. No such circumstance exists here.[3] Foust is merely an arms-length transferee whose equitable interest, if existent, is minimal.

Of particular importance, the BIA, as executor of the trust responsibility to the tribes, opposes the patent correction sought by Foust, as shown in the following excerpt from the IBLA decision:

> 'Please be advised that the Bureau of Indian Affairs opposes the application to correct Mr. Foust's homestead patent. Based on the facts of this case, it is our opinion that a correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes. Further, it is not clear that an error of the description was made.'

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[3] Mantle, unlike Smith, enlisted the help of a surveyor to draw the application and relied upon him to describe the lands correctly. *Mantle Ranch Corp.*, 47 IBLA at 21.

Shoshone and Arapahoe Tribes, 102 IBLA at 274 (quoting Memorandum dated June 16, 1983 from BIA Director to BLM).

In sum, an extensive review of the administrative record compiled in this matter convinces the Court that the IBLA decision is not arbitrary and capricious but, rather, is supported by substantial evidence and is in conformity with the law. Unlike the BLM, the IBLA carefully considered all relevant issues and correctly applied equitable and legal principles to the facts before it.

The mistake theory plaintiff propounds is simply unsupportable. So many facts and circumstances surrounding Smith and his applications exist, only some of which have been addressed above, that a conclusion of mistaken description would stretch the benefit of the doubt to its breaking point. As can be seen from the appendix which accompanies this decision, the relative proximities of the $NE^1/_4SE^1/_4$ (where Smith indicated he built his house and other buildings), lot 5 (where others say Smith built his house but Smith says he only had a garden fence), and lot 11 (where Smith actually built his house and other buildings) are such that it was not reasonably likely for Smith to have mistakenly built on lot 11 in the $SW^1/_4NE^1/_4$.

As for Foust, he owed a duty, as a purchaser of real property, to exercise that diligence any reasonable person would have exercised to verify the identity of the lands he was purchasing prior to accepting the conveyance.

Instead, he remained indifferent and took his chances. Now comes the time to pay the price for that indifference.

NOW, THEREFORE, IT IS

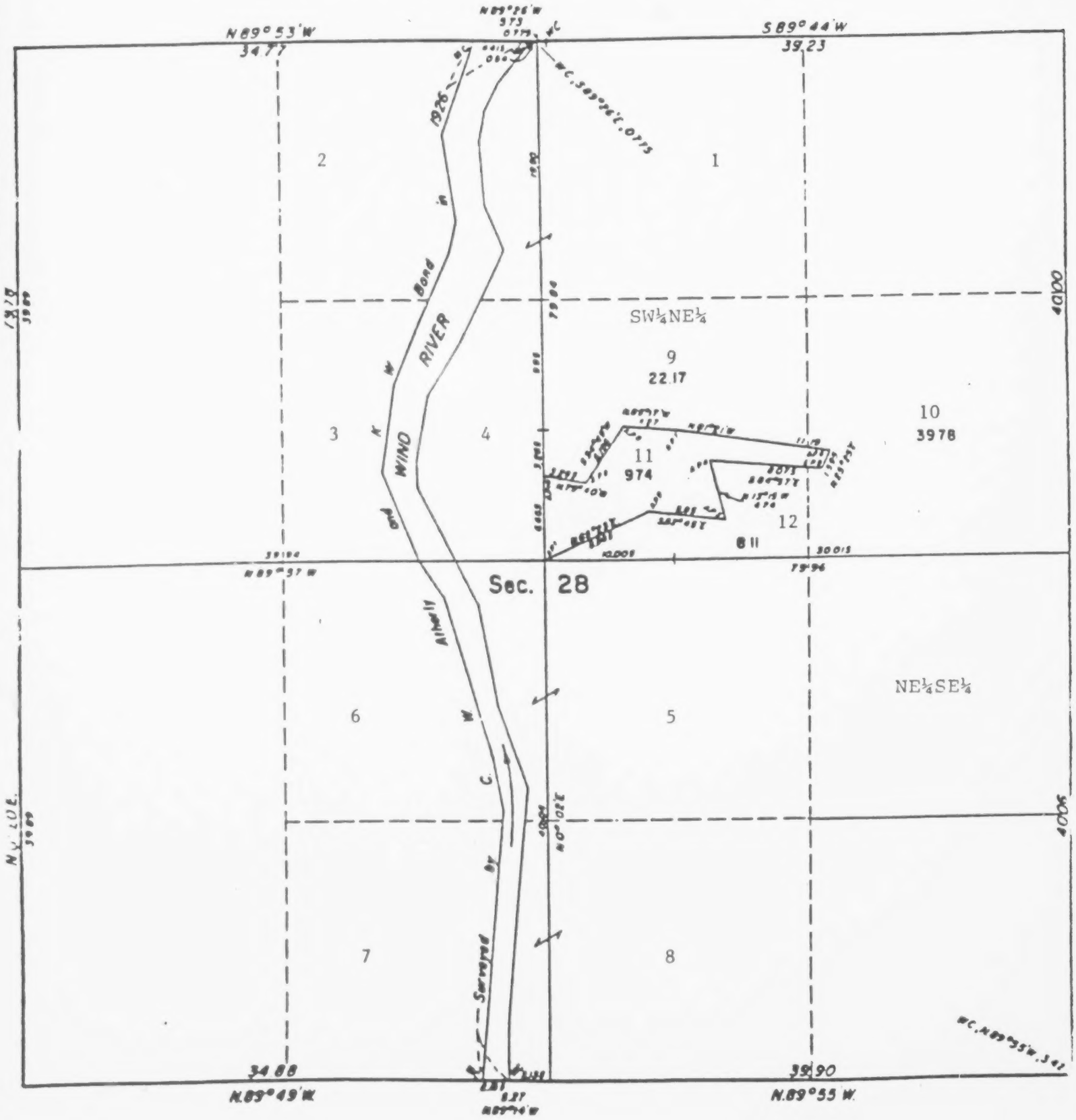
ORDERED that the decision of the Interior Board of Land Appeals be, and the same is, hereby affirmed.

Dated this 13th day of November, 1989.

/s/ Ewing T. Kerr
UNITED STATES
DISTRICT JUDGE

BEST AVAILABLE COPY

TOWNSHIP 6 NORTH, RANGE 6 EAST, OF THE WIND RIVER MERIDIAN



APPENDIX C

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

SHOSHONE AND ARAPAHOE TRIBES

IBLA 86-329 Decided May 23, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, approving application for patent corrections. C-050733 and C-051835.

Reversed.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation (Tribes) appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 30, 1985, approving an application for correction of conveyance documents by Oliver J. and Marjorie E. Foust[1] pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1982). In its decision, BLM found that the two patents held by Oliver Foust (Foust) (Patent No. 1087000 and Patent No. 1087176) erroneously described the lands that his predecessor-in-interest, Byron H. Smith, entered and improved.

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[1] Marjorie Foust died Dec. 27, 1984.

Foust is the record title owner of lots 4 and 5 and the NE¼ SE¼ of sec. 28, T. 6 N., R. 6 E., Wind River Meridian. The lands are located within the Wind River Indian Reservation, Hot Springs County, Wyoming. Foust acquired these lands on June 19, 1963, by warranty deed from Evangeline Smith Meeks, widow of the original patentee, Byron H. Smith. In 1968 or 1969, the Bureau of Indian Affairs (BIA) discovered that Foust's home and other improvements were in trespass on tribal lands and requested an official survey by BLM. Pursuant to Special Instructions dated August 6, 1975, and Supplemental Special Instructions dated June 14, 1979, BLM conducted a dependent resurvey and survey of sec. 28, T. 6 N., R. 6 E., Wind River Meridian, in October and November 1979. The plat of that resurvey and survey was approved by BLM on January 29, 1980. In accordance with the special survey instructions, the S½ NE¼ of sec. 28 was subdivided into lots 9, 10, 11, and 12. The boundaries of lot 11 were established by BLM to include all Foust's improvements. The resurvey confirmed that Foust's home and other improvements were located within the S½ NE¼ of sec. 28, in trespass on tribal lands, and not located on lands conveyed to Foust by Smith's widow.

In order to resolve the trespass situation, Foust proposed to exchange the NE¼ SE¼ of sec. 28 (40 acres) for lot 11 of sec. 28 (9.74 acres), but this offer was rejected by the Tribes. Next, the Fousts offered to exchange lot 5 of sec. 28 (47.55 acres) for lots 9, 11, and 12 of sec. 28 (40.02 acres). the Tribes rejected this offer also.

By letter dated March 15, 1982, the Department of the Interior Field Solicitor, Billings, Montana, informed the Fousts that accrued damages resulting from unauthorized

occupancy from June 16, 1963, to February 15, 1980, totaled $25,000, plus an undetermined rental for 1981 and 1982. The Field Solicitor set forth the following settlement proposals:

> 1. Payment for past rentals up to and including 1981 and 1982.
>
> 2. Execution of an easement to the Tribes to cross fee lands in lot 4, sec. 28, T. 6 N., R. 6 E., [2] to obtain access to other Tribal trust lands.
>
> 3. Possibly entering into a lease by the Tribes to the lands involved in the alleged unauthorized use.

The Fousts found these proposals to be unacceptable and filed an application for correction of conveyance documents pursuant to section 316 of FLPMA, 43 U.S.C. § 1746 (1982), on May 3, 1982. This application explained that it was only after the resurvey was approved on January 29, 1980, that the Fousts learned that their present home with all of its outbuildings was not located on lot 5 as they had previously thought, but was on what is now described as lot 11, located principally in the SW¼ NE¼ sec. 28. The Fousts concluded from this circumstance that a "misdescription of the original homestead appeared on the face of the patent."

The Fousts argued that the best evidence of error in the patent is the layout of the land. They explained that their improvements are located in a small canyon arising

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[2] Lot 4 was sold by the Fousts at sometime prior to their application for patent correction (Land Report at 6).

out of the Wind River, almost perpendicular to Wind River Canyon. They said that for approximately 1 mile north or south of their home, there are no suitable locations for a homestead site because of extremely rough terrain and cliffs, especially in lot 5. They pointed out that the only site upon which a home and improvements could have been reasonably constructed is the present lot 11. The Fousts contended that the error was made because, until 1980, no reliable survey had been made of the area.

In order to correct the perceived error, the Fousts proposed to deed back to the United States lot 5, sec. 28 in exchange for the present lots 9, 10, and 11, sec. 28,[3] which contain almost identical acreage. The Fousts specified that a new patent should be issued to them conveying lots 9, 11, and 12, sec. 28.

In the decision approving the Fousts' application for correction of conveyance documents, BLM found that both of the patents issued to Smith erroneously describe the lands that Smith entered and improved. BLM found that Smith actually entered the SE¼ NE¼ instead of NE¼ SE¼ of sec. 28 in entry C-050733 and the SW¼ NE¼ instead of lot 5 of sec. 28 in entry C-051835. BLM determined that relief was warranted and stated that the patents may be corrected, inter alia, by conveyance of the S½ NE¼, containing the lands upon which Smith built, to the Fousts in exchange for the land patented to Smith in lot 5 and the NE¼ SE¼ sec. 28, which would be

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[3] This proposal should have read lots 9, 11, and 12, rather than 9, 10, 11.

reconveyed to the United States. Attached to this decision was BLM's land report recommending approval of the Fousts' application, upon which report BLM presumably relied in making its determination.

The history of the ownership status of sec. 28 is relevant to consideration of this appeal. On July 3, 1968, the Wild River Indian Reservation was established by treaty concluded between the United States and The Eastern Band of the Shoshone Tribe on lands including sec. 28. The lands in sec. 28 were included in those ceded to the United States pursuant to the Act of March 3, 1905, 33 Stat. 1016. The 1905 Act permitted homesteading on those lands for 5 years after the President declared the reservation open for homesteading. After the 5-year period, sales were to be made only by competitive bidding. 33 Stat. 1020-1022. The President declared the reservation open for homesteading by Presidential Proclamation of June 2, 1906. Thereafter, rather than having competitive bidding for the remaining land, the Secretary, by letter to the Commissioner of the General Land Office, dated May 27, 1915, postponed the sale indefinitely. However, BLM, in its land report dated December 23, 1985, notes that at the time of the 1905 Act, the lands in sec. 28 were unsurveyed and therefore not subject to entry under the homestead laws.

On February 10, 1910, the lands in sec. 28 were withdrawn for Temporary Power Site Withdrawal No. 115 by Executive Order (E.O.). On July 2, 1910, Power Site Reserve No. 115 was established by E.O., pursuant to the Act of June 25, 1910, 36 Stat. 847. The E.O. of July 2, 1910, ratified, confirmed, and continued the withdrawal created by the E.O. of Feb. 10, 1910, and included all of sec.

28 (unsurveyed). The survey plat for a portion of T. 6 N., R. 6 E., including sec. 28, was approved on November 12, 1927, and, by Secretarial Order (SO) dated May 10, 1928, Power Site Interpretation No. 115 was conformed to the powersite withdrawal. Withdrawn lands in sec. 28 included lots 1 through 8, SW1/4 NE1/4, W1/2 NW1/4 and NW1/4 SW1/4. On October 5, 1928, the Official Survey Plat was filed.

By notice of the General Land Office dated November 17, 1928, lands shown on the survey plat filed October 5, 1928, were opened to homestead entry pursuant to the Act of March 3, 1905, beginning December 15, 1928. This notice stated that the lands included in power site reserve 115 were not subject to appropriation except in a case of valid existing claims initiated prior to February 10, 1910. Lands not subject to appropriation included lots 1 through 8, SW1/4 NE1/4, W1/2 NW1/4, NW1/4 SW1/4 sec. 28. Thus, as of December 15, 1928, the NE1/4 SE1/4, which was subsequently patented to Smith, was opened to homestead entry. Then, on August 29, 1930, lots 4 and 5 of sec. 28, which also would be patented to Smith, were opened to entry by Restoration 541. By SO dated Aug. 28, 1942, the Secretary restored "undisposed of ceded land of the Wind River Reservation" in that portion of sec. 28 lying east of the Big Horn River to tribal ownership.

On December 9, 1929, Byron Smith filed an application for stockraising homestead entry No. 050733 on the NE1/4 SE1/4 of sec. 28. The land office rejected Smith's application, stating that the land was not subject to entry under the 1905 Act. On December 15, 1929, Smith appealed this decision. On the same day that he filed his appeal, Smith filed Supplemental Homestead Entry

C-050733 for the same land under R.S. 2289. On July 9, 1930, Homestead Entry C-050733 was allowed under R.S. 2289.

On March 19, 1930, Smith filed an application for a stock-raising homestead entry on lots 4 and 5. This application was allowed March 16, 1931.

In their statement of reasons, the Tribes contend that the lands in question are "Indian lands" not "Public lands" and are not within the purview of section 316 of FLPMA and that FLPMA does not authorize BLM to divest the Tribes of title without their consent to the lands sought by the Fousts. The Tribes assert that even if section 316 did permit the requested relief, BLM could not grant the Fousts' application unless they clearly established that Smith had made a mistake in describing the lands he intended to enter, an occurrence which they deny took place. The Tribes point out that the Fousts' effort to make a showing of such error is contradicted and by the location of the Smith settlement within a power site withdrawal and by Smith's own description of the lands patented. The Tribes believe that Smith's "mistake" was deliberate rather than inadvertent and that no clear error of description has been shown.

In addition to requiring a showing of mistake, the Tribes point out that BLM must determine whether "considerations of equity and justice" mandate the correction and that no such determination has been made by BLM. The Tribes contend that Smith's "apparent fraud" (consisting of the fact that he appears not to have entered the land for agricultural purposes despite his declared purpose to do so), the fact that he could not have obtained

the land now sought by Foust even if he had applied for it, the fact that the 1905 Act never should have been relied upon to patent land in the 1930's, and Foust's own lack of reasonable diligence, all weigh heavily against the application.

In response, Foust states that under section 316 of FLPMA, the rationale for correcting an error in a patent is to simply correct an error that was made at the time the patent was issued. Foust asserts that the lands in question were public lands at the time the patent was issued. In addition, Foust argues that many of the arguments made by the Tribes are collateral attacks on a patent which is insulated by the passage of time from such attacks by provision of 43 U.S.C. § 1166 (1982), a circumstance which he claims renders much of the Tribes' argument irrelevant to these proceedings. Foust states that the statutory purpose of correcting patents is to grant to the present landowner the lands which in reality were originally homesteaded. The only way to accomplish this, according to Foust, is for the Secretary to correct the conveyance to show the actual land originally entered and homesteaded.

Foust contends that the issue here concerns what lands Smith was entitled to claim as a result of compliance with the homestead laws. Foust asserts that the record shows that the only land in the area suitable for homesteading was the land actually improved by Smith.

In response to the Tribes' argument that the lands were not subject to entry under the homestead laws,[4] Foust asserts that under section 316 of FLPMA the Secretary has the authority to determine that issue and make corrections. Foust contends that an error was made and that the best evidence of mistake is the fact that the terrain is so rough in the area described by the patents that it would be impractical, if not impossible, for improvements to have been built there.

Foust believes that there are equities which favor granting the corrections sought. Foust asserts that he and his wife, now deceased, and their predecessors have lived on the land for over 40 years, have constructed further improvements, maintained the land, paid the taxes, and

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[4] The Tribes state that under the 1905 Act, the ceded lands were available for homesteading for a 5-year period beginning in 1906 when the President declared them to be open to entry. Thus, the Tribes contend that after 1911 the lands in question could not be entered for homesteading purposes. The Tribes contend that, as a consequence, the notice of the General Land Office dated Nov. 17, 1928, opening the lands to homestead entry beginning Dec. 15, 1928, was illegal. Since the lands in sec. 28 were unsurveyed at the time of the President's proclamation opening the lands in 1906, the notice of the General Land Office, issued after the official plat of survey was filed in 1928, found that the opening was proper. This notice, however, specifically stated that the lands included in powersite reserve No. 115 were not subject to appropriation except in a case of valid existing claims initiated prior to Feb. 10, 1910. The notice listed SW¼ NE¼ sec. 28 as land withdrawn for powersite reserve No. 115. Since there has been no allegation that Smith entered the SW¼ NE¼ prior to 1910, there is no basis for finding he had a valid existing claim to the withdrawn lands in sec. 28 as a result of his later entry onto those lands.

lived in a small, level valley (described by the parties as a "draw") which is the land best suitable for a homesite in the vicinity of the patented lands. Foust claims that he had a title search made before he purchased the property and was a purchaser in good faith. Foust points out that he is elderly and that the economic hardship in losing his home would be severe. In contrast, Foust contends that granting relief to him would not create any hardship on the Tribes by hindering the economic, social, or long-range development of the reservation. Foust states that BIA entered no objection or made only "tacit" objection to patent correction on appeal.

[1] Section 316 of FLPMA authorizes the Secretary of the Interior to "correct patents * * * where necessary in order to eliminate errors." 43 U.S.C. § 1746 (1982). The statute, thus, invests the Secretary with discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground. *Arthur Warren Jones*, 97 IBLA 253, 254 (1987); *Rosander Mining Co.*, 84 IBLA 60, 63 (1984); *Elmer L. Lowe*, 80 IBLA 101, 105-106 (1984); *George Val Snow (On Judicial Remand)*, 79 IBLA 261, 262 (1984). By regulation the term "error" is limited to mistakes of fact and not mistakes of law. 43 CFR 1865.0-5(b); *Lone Star Steel Co.*, 101 IBLA 369 (1988); *Bill G. Minton*, 91 IBLA 108 (1986). The first obligation of an applicant for amendment of a land description in a patent, then, is to establish that the land description questioned is in fact erroneous. *George Val Snow (On Judicial Remand), supra.* Without a clear showing of error, the Secretary is not empowered to exercise his statutory

discretion to favor or disfavor the application. *Id.* Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. *Id.*

[2] Foust has not shown that there was a mistake of fact involved in the patents in question. He has not pointed to any misdescription or other circumstance to indicate the existence of factual error. On the contrary, he merely concludes, from the fact that his buildings have been shown to be in trespass, that there must have been some mistake. This is not a case, however, where the occurrence speaks for itself, as he assures.

Foust has failed to submit any evidence to show that the patents issued to Smith do not correctly describe the lands he sought in his applications for patent. In his Petition for Designation of the NE¼ SE¼ as stock-raising lands, filed December 9, 1929, Smith stated all the lands in the NE¼ SE¼ sec. 28 are "rough and broken and not susceptible of cultivation" and "of such character that they are not suitable for any other use than grazing purposes and owing to the rough and uneven surface cannot be cultivated." Again in his Petition for Designation of lots 4 and 5 as stock-raising lands dated September 17, 1930, Smith stated that the "land is all of the same general character. It is very rough and covered mostly with sage brush with some native grasses." It is apparent, therefore, that there was no mistake for these words describe the lands for which Smith applied and these are the lands included in his patents.

As the Tribes contend, there are other indications that there was no mistake made by Smith, although he located his buildings outside his patented lands. For example, Foust claims that Smith intended to build his homestead on lot 5 but actually built it on lot 11. Foust describes lot 5 as "extremely rough and steep" and "consist[s] mostly of cliffs," whereas lot 11 is the only spot in the area suitable as a homestead site (Application for Correction at 4). This is inconsistent with Smith's statement in his final proof that his residence was on the original entry, NE¼ SE¼ of sec. 28, not on lot 5. Moreover, it must be observed that because the NE¼ SE¼ and lot 11 do not adjoin one another, it is extremely unlikely that Smith mistakenly confused the location. The only improvement listed as being on lot 5 was a garden fence. Considering the relationship of the NE¼ SE¼ (the lands in Smith's original entry) to the SW¼ NE¼ (the lands now encompassing Foust's improvements), it is difficult to imagine that Smith could have confused the boundary between these parcels. They touch only at a corner and do not share a single boundary. Furthermore, had Smith applied for the lands which he actually improved, his application would have been rejected because the lands were included in a powersite withdrawal. This circumstance negates entirely the possibility that a mistake was made in the description of the patented land.[5]

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[5] Foust refers to the Board's decision in *Mantle Ranch Corp.*, 47 IBLA 17, 87 I.D. 143 (1980), in which the Board stated that even if the rights of the patent holder claiming a right to correction of his patent were subject to the effect of withdrawals, the Secretary could grant relief in his discretion if the

(Continued on following page)

[3] The land where Smith's buildings were placed, the SW1/4 NE1/4, was withdrawn for powersite purposes in 1910 and remained withdrawn until 1942 when it was restored to Tribal ownership. It was not available for homestead entry at the time Smith made his entry. BLM erred, therefore, in finding in the land report attached to the decision under review that the S1/2 NE1/4 "was equally available for entry" with the patented lands in 1928. *See Carmel J. McIntyre*, 67 IBLA 317 (1982), dismissed for lack of subject jurisdiction, *McIntyre v. United States*, 568 F. Supp. 1 (D. Alaska 1983), *aff'd*, No. 85-3861 (9th Cir. May 20, 1986).

In the land report of December 23, 1985, which supplies the foundation for the decision to correct patent now under review, BLM found that Smith's entry was contingent upon a Geological Survey (GS) determination pursuant to section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1982), that the value of the land for power development purposes would not be injured or destroyed by location, entry, or selection under the public land laws. BLM stated that such a determination was made as to lots 4 and 5 in response to Smith's application C-051835 and the patent contains such a restriction. The BLM land report then goes on to say that "[t]he S1/2 NE1/4 of sec. 28, which Smith actually occupied and improved, was equally available for entry when he filed applications C-050733 and C-051835" (Land Report at 6). BLM does

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(Continued from previous page)

agency administering the withdrawn land gave its approval. In the *Mantle* case, however, Mantle's entry preceded both of two described withdrawals.

not mention that the SW¼ NE¼ was specifically excluded from appropriation in the General Land Office notice of November 17, 1928, opening the lands in sec. 28 to homestead entry. There is no evidence that GS made a determination under section 24 of the Federal Power Act respecting the SW¼ NE¼ of sec. 28 as it did for lots 4 and 5.

Land withdrawn for powersite purposes does not become available for entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry. *Carmel J. McIntyre, supra.* The BLM finding concerning the availability to entry of the land which is now lot 11 is clearly erroneous. The erroneous finding was central to the conclusion that a correction such as was purported to be made here, was proper.

The BLM decision before us on appeal does not discuss either the factual or legal basis for the correction of the patent which is ordered by the decision, but assumes that such action is proper, in apparent reliance upon the land report. The findings of the land report, therefore, become very important to an understanding of BLM's decision because they form the legal foundation for the decision. Since the land in the SW¼ NE¼ was continuously closed to entry from 1910 until 1942 when it was returned to tribal ownership, anyone applying for patent to that land would have been refused a patent. It is of course correct that the lands patented to Smith had been also withdrawn for powersite purposes prior to Smith's entry. Indeed, Smith showed that he was familiar with the existence of the powersite withdrawal in sec. 28 in the

appeal he filed with the Department in 1929 following the initial rejection of his homestead entry. Unlike those lands patented, however, which were subsequently opened to entry, the SW¼ NE¼ was never opened. This distinction is important in this case because it indicates there was no application made for the land remaining in the powersite withdrawal because there was no legal possibility that it could be conveyed to an entryman. When the land report blurred this distinction between the land which is now designated lot 11 and the patented lands, that error paved the way for a conclusion that the existence of a mistake was a possibility in this case. But, when this possibility is shown not to exist, the entire notion that there was a mistake is dispelled.

[4] Nor do we find that Foust is entitled to relief in this case as a matter of equity. It is apparent that Foust did not exercise due diligence in purchasing the property in question. Foust implies that until the 1980 resurvey, there was no way he could have discovered that his home and outbuildings were located on the Tribes' lands. The Tribes, however, point out that BIA discovered his trespass by using a GS map and master title plats for the Reservation. Both the 1928 homestead opening and powersite withdrawal were described by reference to the 1928 survey, which was available both to Smith and Foust. The 1928 survey shows the lots and quarter quarters of sec. 28 and the general topography of the land. The 1928 survey also shows the draw where Smith built, and it shows that the draw was not within the land patented to Smith, but that it was located instead within the powersite withdrawal in the SW¼ NE¼. The BIA range conservationist

who detected the trespass did not need to leave his office to see that there was a trespass.

Although Foust argues otherwise, it is apparent the trespass was discovered by BIA before the resurvey in 1980, and that the survey was intended to be used to confirm positively the observed condition. The same sources that BIA used to discover the trespass were available to Foust in 1963 when he purchased the property. The argument that the trespass was undetectible [sic] before the survey approved in 1980 would be more persuasive had Foust ordered his own survey at the time of purchase or relied upon a survey furnished by his seller. As it is, such an argument merely points up the apparent neglect of a purchaser who failed to obtain a survey of lands purchased prior to sale.

Foust claims that when the land was purchased in 1963 it was taken with an abstract of title showing no liens or claims by the Tribes. Foust asserts that he contacted a surveyor and was told that exact surveys in the canyon were impossible (Response to Statement of Reasons at 7). This testimony serves to reinforce our conclusion that Foust was negligent in failing to obtain a survey since the reported response by the surveyor should have alerted him to a possible defect in the survey of the Smith lands. Nor does Foust allege that Smith engaged the services of a surveyor in preparing his applications. Indeed, Foust fails to present any evidence that Smith relied on the opinion of a professional in describing the property. *Cf. Mantle Ranch Corp.*, 47 IBLA 17, 32, 87 I.D.

143, 151 (1980).[6] On appeal, Foust suggests that the 1928 survey was somehow inadequate, but does not specify how it could have deceived Smith concerning the location of the Smith improvements. The 1980 resurvey does not appear to have discovered any error in the 1928 survey, and none is cited by Foust. Like the assertion that mistake can be inferred from the topography of the land surrounding the Smith improvements, this argument also lacks a support in fact.

Foust points out that in *Mantle,* the Board held that "[t]he heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law." *Mantel* [sic] *Ranch Corp.*, 47 IBLA at 38, 87 I.D. at 154. In the *Mantle* case we found that no undue prejudice to the public interest would result from allowing the patent correction because the agency charged with responsibility for the lands sought by the applicant agreed to the changes desired. In this case, however, BIA, one of the responsible agencies, has opposed the change Foust wishes to obtain, as noted *infra.*[7]

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[6] In *Mantle,* the Board noted that the applicant had paid a surveyor to describe his land and to "make out the papers for the original homestead." The Board commented that having entrusted this task to someone he believed to be a professional, it is conceivable that Mantle assumed it had been correctly done and never undertook to analyze it himself. *Mantle Ranch Corp.*, 47 IBLA at 32, 87 I.D. at 151.

[7] Another consideration in *Mantle, supra,* was the fact that there was written acceptance by BLM of a deed from appellant to the United States and the subsequent recordation of that deed at BLM's direction, in contemplation that the patent would be amended. The Board found this had "significant implications in equity." 47 IBLA at 38, 87 I.D. at 154. No such circumstance is present in this case.

In the present appeal, moreover, we have the additional interest of the Tribes to consider. The Federal Government has ultimate responsibility for the Indians. *Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359 (D. Conn. 1982). Supreme Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards. *See Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), citing *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). In reviewing BLM's decision in this case we must be aware that any Federal Government action is subject to the United States fiduciary responsibilities toward the Indian Tribes. *See Nance v. Environmental Protection Agency, supra* at 711.

Here, BIA, the agency administering the SW1/4 NE1/4, is on record as having opposed the correction proposed by Foust for the reason it would be contrary to the best interest of the Tribes. The position of BIA is stated as follows:

> Please be advised that the Bureau of Indian Affairs opposes the application to correct Mr. Foust's homestead patent. Based on the facts of this case, it is our opinion that a correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes. Further, it is not clear that an error of the description was made.
>
> For the foregoing reasons and in fulfilling our trust responsibility to the Tribes, we support the position of the Shoshone and Arapahoe Tribes.

(Memorandum dated June 16, 1983, BIA Area Director to BLM). In effect, BIA endorses the position taken by the Tribes.

Finally, Foust's contention that 43 U.S.C. § 1166 (1982) is applicable to exclude from our consideration the issues raised by the Tribes concerning the equitable position of the Fousts vis-a-vis the Tribes is without merit. That section states: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." Section 1166 is inapplicable. This is not an action to annul a patent. To the contrary, upon review of an administrative determination that a patent should be amended, the Board holds otherwise. We find no foundation in fact for holding that Smith's patents were meant to convey any land other than lots 4 and 5 and the NE¼ SE¼ sec. 28, the land described by the patents. *See Roland Oswald,* 35 IBLA 79, 88-89 (1978). An application to change the legal description of a patent may not be approved where the record does not support a finding that the entryman erred in describing the lands that he entered. *Ben R. Williams,* 57 IBLA 8 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

/s/ Franklin D. Arness
Franklin D. Arness
Administrative Judge

We concur:

/s/ John H. Kelly
John H. Kelly
Administrative Judge

/s/ Wm. Philip Horton
Wm. Philip Horton
Chief Administrative Judge

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Land Management
Wyoming State Office
P.O. Box 1828
Cheyenne, Wyoming 82003

DECISION

Mr. Oliver J. Foust
c/o Mr. John R. Hursh,
Attorney-at-Law
Central Wyoming Law
Associates, P.C.
105-107 South 6th East
Riverton, Wyoming 82501

Correction of Conveyance Document C-050733/ C-051835 – Application Approved Additional Evidence Required

Dear Mr. Foust:

On May 3, 1982, you filed an Application for Correction of Conveyance Document under Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746 (1982), to correct the patent granting lots 4 and 5 of section 28, T. 6 N., R. 6 E., Wind River Meridian (WRM), Wyoming. Your application involves two patents granted to Byron H. Smith: Patent No. 1087000 issued November 12, 1936, for Homestead Entry Serial No. Cheyenne 050733 conveying the NE¼SE¼ of section 28, and Patent No. 1087176 issued November 24, 1936, for Stockraising Homestead Entry Serial No. Cheyenne 051835 conveying lots 4 and 5 of section 28, all in T. 6 N., R. 6 E., WRM. Both of these patents erroneously describe the lands your predecessor in interest, Byron H. Smith, entered and improved. Smith actually entered the SE¼NE¼ instead of the NE¼SE¼ of section 28 in entry C-050733 and the SW¼NE¼ instead of lot 5 of section 28 in entry

C-051835. Accordingly, I have determined that relief is warranted and appropriate and your Application for Correction of Conveyance Document Serial Nos. C-050733 and C-051835 is approved. The errors in Patents Nos. 1087000 and 1087176 may be corrected in the following manner:

1. Cancel the survey of section 28, T. 6 N., R. 6 E., WRM, accepted January 29, 1980, creating lots 9, 10, 11, and 12 within the $S^1/_2NE^1/_4$ of section 28.

2. *Patent No. 1087000 – C-050733*

a. Reconvey the $NE^1/_4SE^1/_4$ of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to the United States by warranty deed.

b. Upon acceptance of title by the United States, issue a decision cancelling the patent, correcting the final certificate for C-050733 to read $SE^1/_4NE^1/_4$ of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a new and correct patent for Homestead Entry C-050733 conveying the $SE^1/_4NE^1/_4$ of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to Oliver J. Foust.

3. *Patent No. 1087176 – C-051835*

a. Reconvey lot 5 of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to the United States by warranty deed.

b. Restore the $SW^1/_4NE^1/_4$ of section 28, T. 6 N., R. 6 E., WRM, now withdrawn by S.O. 5/10/1928 for Power Site Reserve No. 115, to allow conveyance subject to Section 24 of the Federal Power Act.

c. Upon acceptance of title to lot 5 of section 28 by the United States, issue decision correcting the final certificate for C-051835 to read SW¼ NE¼ instead of lot 5 of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a corrective patent conveying the SW¼NE¼ of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to Oliver J. Foust. (See Map No. 6.)

Upon reconveyance of lot 5 and the NE¼SE¼ of section 28 to the United States, the lands would be restored to tribal ownership by Public Land Order.

A copy of the Land Report for this application is attached. The complete case record is on file at this office and may be reviewed upon request.

We may continue processing your application upon receipt of the following:

1. *A warranty deed* reconveying all right, title, and interest to lot 5 and the NE¼SE¼ of section 28, T. 6 N., R. 6 E., WRM, Wyoming, to the United States of America. The deed should contain a clause stating it is *given for and in consideration of corrective patents conveying certain lands and interests pursuant to Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746 (1982).* The deed should not be recorded until it is accepted by the United States and returned to you for that purpose.

2. *Evidence of ownership* showing the applicant, Oliver J. Foust, is the current record owner of lot 5 and the NE¼SE¼ of section 28, T. 6 N., R. 6 E., WRM. Such evidence may be in the form of a *policy of title insurance,* a *certificate of title,* or an *abstract of title* prepared by a title insurance company or by an abstracter approved by the

Bureau of Land Management. The evidence must show all encumbrances affecting the above lands.

3. *Evidence of payment of taxes* assessed or levied upon the lands reconveyed. If such taxes are not due and payable until some future date, the applicant may furnish a bond with a qualified surety for double the amount of taxes paid on the land for the previous year, or, in lieu of a bond, a cash deposit in like amount, to secure the payment of such taxes. When proper evidence of payment in full of such taxes furnished by the applicant, liability under the bond will be terminated or the cash deposit will be returned.

4. *Original Patent No. 1087000.* This patent should be surrendered. If this proves to be impossible, the applicant must show what efforts were made to procure it for surrender. If the patent has been lost, destroyed, or is otherwise unavailable, a notarized statement showing such facts may be furnished.

The applicants have submitted a deposit in the amount of $800.00 for reimbursement of the Bureau's cost of processing this application. Final regulations implementing Section 316 of the Federal Land Policy and Management Act of 1976, 43 CFR Subpart 1865, issued subsequent to the filing of this application do not provide for reimbursement of application processing costs. Accordingly, refund of this deposit is authorized. You will receive a U.S. Treasury check in the amount of $800.00 in 6 to 8 weeks.

The right of appeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulations in 43 CFR Part 4, Subpart E. However, if an appeal is to be taken, the Notice of Appeal must be filed in this

office (not with the Board), so that the case files can be transmitted to the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. (See enclosed information sheet outlining procedures to be followed when filing an appeal.) Please note that the Rules of Practice now require that you serve a copy of the Notice of Appeal, any Statement of Reasons, written arguments or briefs on the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225-0047, as well as any adverse parties within fifteen (15) days of filing any document in connection with an appeal.

The adverse parties are the Shoshone and Arapahoe Tribes, Wind River Indian Reservation, Wyoming:

Shoshone Tribe
c/o Mr. Kenneth J. Guido, Jr.
4540 Klingle St., N.W.
Washington, D.C. 20016

Arapahoe Tribe
c/o Mr. Robert C. Pelcyger,
Fredericks & Pelcyger,
Attorneys-at-Law
Canyon Center,
1881 95th St., Suite 216
Boulder, CO 80302

Sincerely yours,

/s/ Hillary A. Oden
Hillary A. Oden
State Director

2 Enclosures
Encl. 1 Form 1842-1
Encl. 2 Land Report

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-8004

OLIVER J. FOUST,

Plaintiff-Appellant,

v.

MANUEL LUJAN, JR.,
Secretary of the Interior,

Defendant-Appellee,

NORTHERN ARAPAHO AND
SHOSHONE INDIAN TRIBES OF THE
WIND RIVER INDIAN RESERVATION,

Defendants-Intervenors-Appellees.

ORDER

Filed October 24, 1991

Before McKAY, Chief Judge, SETH, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing with suggestion for rehearing en banc, filed in the captioned case.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted. Judge McKay would grant rehearing before the panel.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

APPENDIX F

Excerpts from Act of March 3, 1905, ch. 1452, 33 Stat. 1016

CHAP. 1452. – An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

Whereas James McLaughlin, United States Indian inspector, did on the twenty-first day of April, nineteen hundred and four, make and conclude an agreement with the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Reservation in the State of Wyoming, which said agreement is in words and figures as follows:

This agreement made and entered into on the twenty-first day of April, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, witnesseth:[1]

ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by

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[1] Wadsworth v. Boysen, 148 Fed., 771.

the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: *Provided:* That any individual Indian, a member of the Shoshone or Arapahoe Tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the

provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law, within three years therefrom, shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded, within two years after the opening of the same to entry, shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law, the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal, and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entryman fails to make the payments herein provided for or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited, and the entry shall be forfeited and canceled, unless the Secretary of the Interior shall in his discretion, and for good cause, excuse for not exceeding six months, the said failure, application for which must be made by the settler on or before the date of the payment which would bring him or her in default, and all lands except mineral and

coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry, shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal, and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, and also to pay the said Indians the sum of one dollar and twenty-five cents per acre for sections sixteen and thirty-six, or an equivalent of two sections in each township of the ceded lands, the amounts so realized to be paid to and expended for said Indians in the manner hereinafter provided.[1]

* * *

ARTICLE VIII It is further agreed that the proceeds received from the sales of said lands, in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement.

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United

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[1] 23 Opp. Atty. Gen. 524.

States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township or to dispose of said land except as provided herein, or to guarantee to find purchasers for said land or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE XI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U. S. Indian Inspector, on the part of the United States, and the male adult Indians belonging on the Shoshone or Wind River Indian Reservation, Wyoming, have hereunto set their hands and seals at the Shoshone Agency, Wyoming, this twenty-first day of April, A. D. nineteen hundred and four.

JAMES MCLAUGHLIN, [SEAL.]
U.S. Indian Inspector.

APPENDIX G

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
Washington

Office of the Director

July 1, 1910

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your instructions I recommend the withdrawal for water-power of the following areas:

ORDER OF WITHDRAWAL.

Power-site Reserves Nos. 104 to 146 inclusive.

It is hereby ordered that those certain orders of withdrawal made heretofore:

On Jan. 17, 1910, described as Temporary Power-site Withdrawal No. 104; On Jan. 17, 1910, described as Temporary Power-site Withdrawal No. 105; On Jan. 18, 1910, described as Temporary Power-site Withdrawal No. 106; On Jan. 21, 1910, described as Temporary Power-site Withdrawal No. 107; On Jan. 20, 1910, described as Temporary Power-site Withdrawal No. 108; On Jan. 24, 1910, described as Temporary Power-site Withdrawal No. 109; On Jan. 24, 1910, described as Temporary Power-site Withdrawal No. 110; On Feb. 2, 1910, described as Temporary Power-site Withdrawal No. 111; On Feb. 8, 1910, described as Temporary Power-site Withdrawal No. 112;

On Feb. 8, 1910, described as Temporary Power-site Withdrawal No. 113; On Feb. 10, 1910, described as Temporary Power-site Withdrawal No. 114; On Feb. 10, 1910, described as Temporary Power-site Withdrawal No. 115; On Feb. 18, 1910, described as Temporary Power-site Withdrawal No. 116; On Feb. 25, 1910, described as Temporary Power-site Withdrawal No. 117; On Feb. 26, 1910, described as Temporary Power-site Withdrawal No. 118; On Mar. 9, 1910, described as Temporary Power-site Withdrawal No. 119; On Mar. 9, 1910, described as Temporary Power-site Withdrawal No. 120; On Mar. 18, 1910, described as Temporary Power-site Withdrawal No. 121; On Mar. 18, 1910, described as Temporary Power-site Withdrawal No. 122; On Mar. 17, 1910, described as Temporary Power-site Withdrawal No. 123; On Mar. 18, 1910, described as Temporary Power-site Withdrawal No. 124; On Mar. 18, 1910, described as Temporary Power-site Withdrawal No. 125; On Mar. 16, 1910, described as Temporary Power-site Withdrawal No. 126; On Mar. 19, 1910, described as Temporary Power-site Withdrawal No. 127; On Mar. 21, 1910, described as Temporary Power-site Withdrawal No. 128; On Mar. 23, 1910, described as Temporary Power-site Withdrawal No. 129; On Mar. 23, 1910, described as Temporary Power-site Withdrawal No. 130; On Mar. 25, 1910, described as Temporary Power-site Withdrawal No. 131; On Mar. 24, 1910, described as Temporary Power-site Withdrawal No. 132; On Mar. 25, 1910, described as Temporary Power-site Withdrawal No. 133; On Mar. 30, 1910, described as Temporary Power-site Withdrawal No. 134; On Mar. 31, 1910, described as Temporary Power-site Withdrawal No. 135; On April 9, 1910, described as Temporary Power-site Withdrawal No. 136;

On April 12, 1910, described as Temporary Power-site Withdrawal No. 137; On April 11, 1910, described as Temporary Power-site Withdrawal No. 138; On April 15, 1910, described as Temporary Power-site Withdrawal No. 139; On May 5, 1910, described as Temporary Power-site Withdrawal No. 140; On May 6, 1910, described as Temporary Power-site Withdrawal No. 141; On May 6, 1910, described as Temporary Power-site Withdrawal No. 142; On May 11, 1910, described as Temporary Power-site Withdrawal No. 143; On May 14, 1910, described as Temporary Power-site Withdrawal No. 144; On May 19, 1910, described as Temporary Power-site Withdrawal No. 145; On May 17, 1910, described as Temporary Power-site Withdrawal No. 146; and including the lands more particularly described and set forth below, be, and the same are hereby ratified, confirmed, and continued in full force and effect, and the lands reserved for water-power sites, subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910:

Wind River Meridian, Wyoming

Illegible

N., R. 6 E.,

Sec. 4, lots 6, 9, 11, 12, 13;
Sec. 5, E1/2;
Sec. 8, E1/2;
Sec. 9, lot 3;
Sec. 16, lot 9, NE1/4 OF SE1/4, S1/4 of SE1/4;
Sec. 17, lots 3, 4, W1/2, of NE1/4, NW

	1/4 Illegible Sec. 20, lots 2, 11, NW1/4 of NW1/4; Sec. 21, E1/2 of NE1/4, SE1/4.
Illegible N., R. 6 E.,	Sec. 4, lots 5, 6, W1/2 of E1/2; Sec. 5, SE1/4 of SE1/4; Sec. 8, lots 1, 2, 3, E1/2 of SE1/4; Sec. 9, lots 1, 2, 3, 4, 5, NE1/4 of NW 1/4, E1/2 of Illegible Sec. 17, lots 1, 2, 3, 4, SE1/4 of NE1/4, Illegible Sec. 20, lots 1, 2, NE1/4, W1/2 of SE1/4; Sec. 21, lots 1, 2, 3, 4, 6, 7, WIllegible Sec. 22, lot 4; Sec. 27, lots 1, 2, 3, 4; Sec. 28, lots 1, 2, 3, 4, 5, 8, 9, SE1/4 of NE1/4 of Illegible, S1/2 of SE1/4, Illegible. Sec. 29, NE1/4, W1/2 of SE1/4; Sec. 32, lots 2, 3, N1/2 of NE1/4, SW1/4, of NE1/4 Illegible Sec. 33, NW1/4 of NE1/4; Sec. 34, lots 1, 2, 3.
Illegible N., R. 6 E.,	Sec. 4, W1/2 of E1/2, W1/2; Sec. 5, E1/2; Sec. 8, NE1/4, lot 1; Sec. 9, lots 1, 2, 3, NW1/4, unsurveyed portions of Illegible Sec. 15, W1/2 of W1/2; Sec. 16, E1/2; Sec. 21, all;

Sec. 22, NW¼ of NW¼;
Sec. 28, all;
Sec. 33, N½ of NE¼, SW¼ of NE¼, NW¼, unsurveyed portions of E½ of SW¼ and W½ of SE¼, east of the Big Horn River.

T. 7 N., R. 6 E., Sec. 18, lots 2, 3, 4;
Sec. 19, lots 1, 2, 4, 5, 6, 7, 10, 11, E½ of SE¼;
Sec. 29, lots 1, 2, 3, 4, 5, SW¼ of NW ¼;
Sec. 30, lots 1, 2, 5, 6, 7, NE¼ of NE ¼, SE¼ of NW¼, NW¼ of SE¼, SE ¼ of SE¼;
Sec. 32, lots 1, 2, 3, 4, 5, SE¼ of SE¼;
Sec. 33, lots 1, 2, 3, SW¼ of NW¼.

* * *

Very respectfully,

/s/ Illegible
Directer.

July 1, 1910.
respectfully referred to the
resident with the recommendation
that name be approved.

(Signed) R. A. Ballinger
Secretary.

approved JUL - 2 1910
and referral to the Secretary of the Interior.

(Signed) WM. H. TAFT.
President.

APPPENDIX H

Referred to the Commissioner of the General Land Office for appropriate action.

FRANK PIERCE
Acting Secretary.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON

INTERPRETATION NO. 115
of
Temporary Power Site Withdrawal No. 115
and Power Site Reserve No. 115

Big Horn River, Montana and Wyoming.

It is hereby ordered that so much of the orders of February 10, 1910, creating Temporary Power Site Withdrawal No. 115 "Big Horn River, Montana and Wyoming," and of July 2, 1910, creating Power Site Reserve No. 115 as describes lands, whether surveyed or unsurveyed, in Secs. 15, 16, 21, 22, 28, and 33 and the S1/2 of Sec. 9, T. 6 N., R. 6 E., Wind River Meridian, Wyoming, be construed in conformity with the official survey of said township accepted in the General Land Office, February 20, 1928, to describe the following lands:

Wind River Meridian

T. 6 N., R. 6 E., Sec. 9, lots 1, 2, 3, 6, 7, 8, 9, 10 SW¼ of SW¼;
Sec. 15, all, fractional;
Sec. 16, lots 1, 2, 3, 4, 5, NE¼ of SE¼;
Sec. 21, lots 1, 2, 3, 4, 5, 6, 7, 8, 9, SE¼ of NE¼, SE¼ of NW¼;
Sec. 22, lot 1;
Sec. 28, lots 1, 2, 3, 4, 5, 6, 7, 8, SW¼ of NE¼, W½ of NW¼, NW¼ of SW¼;
Sec. 33, lots 3, 4, 5, 6, 7, 8.

Illegible
Secretary.

MAY 10 1928

Carbon to Federal Power Commission.
2 Carbons to General Land Office.

APPENDIX I

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

Opening Shoshone Indian lands to entry.

Register,

Cheyenne, Wyoming.

Sir:

On August 28, 1928, you transmitted a copy of a notice showing that the plat of survey of T. 6 N., R. 6 E., W. R. M., would be officially filed in your office on October 5, 1928, at 9 a.m.

The lands shown upon this plat are within that portion of the Shoshone Indian Reservation ceded under the act of March 3, 1905 (33 Stat. 1016), and may now be opened to homestead entry under the provisions of said act.

It is therefore ordered pursuant to Public Resolution No. 29, approved February 14, 1920 (41 Stat. 434), as amended by Public Resolutions Nos. 36 and 79, approved January 21 and December 28, 1922 (42 Stat. 358 and 1067, respectfully; that the above mentioned lands be opened to entry only under the homestead laws and the act of March 3, 1905 (33 Stat. 1016), and President's proclamation of June 2, 1906 (34 Stat. 3208), by ex-service men of the World War under the terms and conditions of such resolutions and regulations issued thereunder on May 1,

1922 (Circular 822), for a period of 91 days beginning with the 28th day from the date hereof.

* * *

Subsequent to the date hereof and prior to the date of restoration to general disposition as herein provided, no rights may be required to said lands by settlement in advance of entry or otherwise except strictly in accordance herewith.

Persons who make entries for any of these lands within two years after the opening shall pay therefor at the rate of $1.50 per acre; thereafter the lands will be subject to entry at the rate of $1.25 per acre, payment in all cases to be made as follows: 50 cents an acre at the time of making entry and 25 cents an acre each year thereafter until the total purchase price is paid.

The following lands as construed to conform to the plat of survey by the Secretary on May 10, 1928, interpretation No. 115; are included in power site reserve No. 115, pursuant to Executive order of July 2, 1910, first withdrawn for temporary power site by the Secretary on February 10, 1910, and they are therefore not subject to appropriation except in case of valid existing claims initiated prior to February 10, 1910, the date when they were first withdrawn for power site reserve:

> Lots 6 to 10, inclusive, Sec. 9, all fr'l Sec. 15, lots 1, 2, 3, 4, 5, NE¼ SE¼, Sec. 16, lots 1 to 9, inclusive, SE¼ NE¼, SE¼ NE¼ Sec. 21, lot 1 Sec. 22, lots 1 to 8, inclusive, SW¼ NE¼, W½ NW¼, NW¼, SW¼, Sec. 28, lots 3 to 8, inclusive, Sec. 33.

* * *

Promptly report compliance with instructions herein contained.

Very respectfully,

/s/ Illegible
Commissioner.

Approved: NOV 17 1928

Illegible

First Assistant Secretary.

Date of Order November 17, 1928.

Simultaneous filing period for soldiers from November 24, 1928.

APPENDIX J

WIND RIVER RESERVATION, WYOMING

Order restoring Lands to Tribal Ownership

Whereas pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapaho Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 673), and

Whereas there is now remaining undisposed of within the ceded or "opened" portion of the Wind River Reservation, an area of approximately 1,108,700 acres of such ceded lands, most of which is urgently required as grazing land for the use of the Shoshone-Arapaho Tribes of Indians in order properly to support and develop their greatly expanded cattle industry, and

Whereas the Acting Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of all the undisposed of ceded lands within the following described land use districts, of which no part of the land is under lease or permit to non-Indians:

WIND RIVER MERIDIAN

LAND USE DISTRICT NO. 13

T. 5 N., R. 5 E.,
Secs. 1 to 4, inc., and
Secs. 7 to 36, inc.;
T. 6 N., R. 5 E.,
Sec. 33, S1/2,
Sec. 34, S1/2,

Sec. 35, S1/2,
Sec. 36, S1/2.
T. 5 N., R. 6 E.,
Sec. 5, W1/2,
Secs. 6 and 7,
Sec. 5, W1/2,
Sec. 17, W1/2,
Secs. 18 and 19,
Sec. 20, W1/2,
Sec. 29, W1/2,
Secs. 30 and 31,
Sec. 32, W1/2, SW1/4SE1/4, lot 7 and those parts of lots 4, 6 and 10 in W1/2E1/2;
T. 6 N., R. 6 E.,
Sec. 31, S1/2,
Sec. 32, SW1/4.

LAND USE DISTRICT NO. 24

T. 6 N., R. 4 E.,
Sec. 13, NE1/4 and S1/2,
Sec. 23, S1/2,
Sec. 24;
T. 7 N., R. 4 E.,
Sec. 13, lots 2, 3, 4, 5, and SW1/4SW1/4,
Sec. 14, S1/2,
Sec. 15, S1/2,
Sec. 16, S1/2,
Secs. 21 to 34, incl.;
T. 6 N., R. 5 E.,
Sec. 1, N1/2, N1/2SW1/4 and SW1/4SE1/4,SW1/4,
Sec. 15 to 30, incl.,
Sec. 12, W1/2NE1/4SE1/4NW1/4 and S1/2,
Secs. 13 to 30, incl.,

Sec. 31, N1/2,
Sec. 32, N1/2,
Sec. 33, N1/2,
Sec. 34, N1/2,
Sec. 35, N1/2,
Sec. 36, N1/2;
T. 7 N., R. 5 E., all;
T. 6 N., R. 6 E., that part west of Big Horn River (partly unsurveyed);
T. 7 N., R. 6 E., that part west of Big Horn River.

LAND USE DISTRICT NO. 39

T. 6 N., R. 6 E.,
Sec. 3,
Secs. 4, 5 and 8, those parts east of Big Horn River.
Sec. 9, N1/2,NE1/4SE1/4,
Sec. 10,
T. 7 N., R. 6 E., that part east of Big Horn River.

LAND USE DISTRICT NO. 42

T. 5 N., R. 6 E.,
Sec. 4, lots 13 and 14,
Sec. 5, lots 5, 6 and SW1/4SE1/4,
Sec. 8, lots 4 to 9, incl., and W1/2E1/2,
Secs. 9 and 16, those parts west of Big Horn River,
Sec. 17, lots 5 to 10, incl., and W1/2E1/2,
Sec. 20, lots 3 to 8, incl., and W1/2NE1/4, NW1/4SE1/4,
Sec. 21, lots 2 and 5,
Sec. 28, lots 2, 3, and 4,
Sec. 29, lots 1, 2 and 3.

LAND USE DISTRICT NO. 44

T. 5 N., R. 6 E.,
Sec. 3,
Sec. 4, lots 7 to 12, incl., lots 15 and 16, $SE^1/_4$,
Secs. 8 and 9, those parts east of Big Horn River.
Sec. 16, lots 8, 9, 14, 15, 16, 18, and $NE^1/_4$, $NE^1/_4NW^1/_4$, $SW^1/_4SW^1/_4$, $N^1/_2SE^1/_4$, $N^1/_2S^1/_4SE^1/_4$, $SW^1/_4SW^1/_4SE^1/_4$,$SE^1/_4SE^1/_4SE^1/_4$,
Sec. 17, that part east of Big Horn River,
Sec. 21, lots 12 to 16, incl., $E^1/_4NE^1/_4NE^1/_4$, $SW^1/_4NE^1/_4NE^1/_4$, $NW^1/_4NW^1/_4SE^1/_4$, $SE^1/_4NW^1/_4NE^1/_4$, $E^1/_2SW^1/_4NE^1/_4$, $SE^1/_4NE^1/_4$, $E^1/_2$ $SE^1/_4$,
Secs. 22, 27 and 34;
T. 6 N., R. 6 E.,
Sec. 21, that part east of Big Horn River,
Secs. 22 and 27,
Secs. 28 and 33, those parts east of Big Horn River,
Sec. 34.

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands within the area described above, which are classified as undisposed of ceded land of the Wind River Reservation, Wyoming, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the

existing Wind River Reservation, subject to any valid existing rights.

ABE FORTAS,

Acting Secretary of the Interior.

August 28, 1942.

WIND RIVER RESERVATION, WYOMING

Order Restoring Lands to Tribal Ownership

Corrections

In the document appearing on page 7458 of the issue for Tuesday, September 22, 1942, the following changes should be made: In Land Use District 13, the third entry under Township 5 North, Range 6 East, should read "Sec. 8, W1/2", instead of "Sec. 5, W1/2". In Land Use District 24, the fifth entry under Township 7 North, Range 4 East should read "Secs. 21 to 24 incl.;" instead of "Secs. 21 to 34, incl.;". The second entry under Township 6 North, Range 5 East should read "Secs. 2 to 11, incl.;" instead of "Sec. 15 to 30, incl.;". In Land Use District 44, under Township 5 North, Range 6 East the description under sec. 16 which reads "N1/2S1/4SE1/4" should read "N1/2S1/2 SE1/4". The description under sec. 21 which reads "NW1/4 NW1/4SE1/4" should read "NW1/4NW1/4NE1/4".

APPENDIX K

43 U.S.C. § 1702

Definition

(e) The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquire ownership, except –

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1746.

Correction of conveyance documents

The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 of this title or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands.

(Pub. L. 94-579, Title III, § 316, Oct. 21, 1976, 90 Stat. 2770.)

Supreme Court, U.S.
FILED
FEB 19 1992
OFFICE OF THE CLERK

No. 91-1209

In The

Supreme Court of the United States

October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR., Secretary of the Interior,

Respondents.

Opposition of Oliver J. Foust to a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF OLIVER J. FOUST

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Oliver J. Foust

QUESTIONS PRESENTED FOR REVIEW

I. THE LEGAL QUESTIONS PRESENTED WERE NOT PRESERVED OR PURSUED BY THE TRIBES BELOW.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUES.

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No. 91-1209

In The

Supreme Court of the United States

October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR., Secretary of the Interior,

Respondents.

Opposition of Oliver J. Foust to a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF OLIVER J. FOUST

The respondent, Oliver J. Foust, respectfully files his opposition to the Petition for Writ of Certiorari in this case.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE.

This petition is brought by the Arapahoe and Shoshone Indian Tribes ("Tribes") from the decision of the Tenth Circuit Court of Appeals. Mandate was issued to the District Court which has subsequently entered its Order and Judgment reinstating the original 1985 decision of the Wyoming State BLM Director as the proper and final disposition of this dispute. The District Court's Order is attached hereto at p. 1a. The State BLM Director's decision is at 53a of the Tribes' Appendices.

The BLM State Director's decision calls for the correction of the conveyance errors found in the original patents issued to respondent, Oliver J. Foust's ("Foust"), predecessor in interest in 1936. Under the BLM decision, the Tribes are to receive an equal amount of land returned from Foust in exchange for the corrected patents.

The respondent, Manual Lujan, Jr., Secretary of the Interior, has not joined in the Tribes' petition. The United States has accepted the decision of the Court of Appeals as a fair and equitable result to end this dispute.

A misstatement of the record does appear in the Tribes' petition on page 8. The Interior Board of Land Appeals ("IBLA") never did order or conduct a full hearing on the Tribes' appeal.

B. THE HISTORY OF THE PATENTS AND PARTIES.

This case is a private dispute between the Tribes and Foust over specific parcels of land concerning whether or not the erroneously conveyed patents in 1936 should be corrected by the Secretary of the Interior.

A full and concise history of the lands involved was

prepared by the Wyoming State BLM Director.[1] The chronologies and events contained therein are not in dispute. This land report is attached for the Court's convenience at p. 2a of this respondent's Appendices. This case is primarily a factual rather than a legal dispute. The facts relevant to this opposition, as developed in the administrative record by respondent Foust, are briefly summarized as follows:

1. The lands involved in this dispute are located within an area known as the Wind River Canyon in west central Wyoming. The area is on the eastern edge of the Wind River Indian Reservation. The canyon is marked by steep rocky cliffs and has within it very few places where homesteads could have been located and built. The BLM Land Report description is most appropriate:

> ... The canyon is over one-half mile deep and about one and one-half miles wide through Section 28....Topography is characterized by steep, rocky slopes and sheer cliffs. The partial survey of T. 6 N., R. 6 E., WRM, approved April 10, 1906, delineates the entire stretch of the Wind River Canyon through the township as "unsurveyable." While later surveyed in 1926 and 1927, such delineation indicated the difficulty of surveying the lands and, implicitly in locating and identifying the specific subdivisions. (Land Title Report p. 8, Appendices p. 15a.)[2]

The canyon was resurveyed by the United States in 1929. The field notes for this survey contain numerous references to inabilities to fix corners and determine bound-

---

[1] The BLM conducted an extensive field examination, records and archives search and liaisoned with the BIA and all other interested parties and witnesses in making up its Land Report. This process took well over two years.

[2] The 1906 Government map of Section 28 is attached at p. 20a. Section 28 is shown to be unsurveyable.

aries in this part of the canyon. It is upon this survey that the erroneous descriptions for the patents at issue were based.[3]

2. This canyon was opened to the public for homesteading by the Tribes cessation codified in the March 3, 1905 Act, 33 Stat. 1016. The entire canyon was withdrawn as a powersite reserve subject to the restoration procedure available to any entryman under Section 24 of the Federal Power Act, 16 U.S.C. § 818. It was this canyon that attracted Byron Smith and his wife in 1929 to make their homestead.

3. Contrary to the implications in the Tribes' petition, Smith was not a squatter. He was a wounded and disabled veteran from World War I and as such had earned his homestead preferences allowed him by his military service under the law. It was a promise made to him by the United States Government.

4. Smith and his wife chose one of the few "narrow draws" in the Canyon upon which they could construct a home.

5. Smith determined that his desired homestead was located in the NE1/4SE1/4, Lots 4 and 5 of Section 28 as taken from the 1929 survey mentioned above. Applications were made for these parcels and patents were issued by the United States in 1936. Smith paid the consideration for these parcels as required by law and this money was applied to the benefit of the Tribes. Significant in this process was the restoration from the powersite reserve of Lots 4 and 5 upon routine application under the Federal Power Act.[4] On the 1929 survey are the marginal entries indicating that for every entry made into the canyon by the homesteaders, all were restored from the powersite withdrawal and patented. Also, Smith was excused from the cultivation requirements for his homestead by operation of the Act of August 19, 1935. 49 Stat. 659, as relates to disabled veterans.

---

[3] The 1929 survey map for Section 28 is attached at p. 21a.

[4] The Restoration Order is attached at p. 29a.

6. Most important in this history and specifically noted by the Court of Appeals was the effect of the "on-site" inspection of the property by Max Caplan, Special Agent of the Department of the Interior on October 31, 1935. Caplan was dispatched to investigate Smith's final proof on the proposed entries. At this time, Smith's home and buildings *had been built* in the narrow draw. Special Agent Caplan inspected the proposed entry and as Smith had done, mistakenly certified on behalf of the United States that the entry *and improvements* were in fact located in the NE1/4SE1/4, Lots 4 and 5 of Section 28. Caplan's Report is attached.[5] Consequently, in 1936 the United States erroneously described the tracts it intended to convey to Smith. This mistake was mutual by Smith and the United States and was clearly established in the record.

7. All of Smith's proofs, the Affidavits of his subscribing witnesses, his descriptions of the small springs consistently and mistakenly placed the entries and improvements in the NE1/4SE1/4, Lots 4 and 5. His neighbors verified under oath that they all believed the improvements were on the lands erroneously described in the patents.[6]

8. As noted in the BLM Land Report, "the records show that Smith complied with the provisions of applicable laws to the satisfaction of officials of the Department of the Interior and was entitled to receive patents to lands he actually entered and improved."[7]

9. Smith's applications with descriptions of the entries and location of the improvements built thereon were advertised as required by law and no objections were made by Tribes or the Bureau of Indian Affairs.

10. Smith died in 1958. In 1963, Smith's widow sold the property for fair consideration to Foust and his wife by

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[5] Respondent's Appendices at p. 27a.

[6] Bonnie Bleak's Affidavit is at p. 38a. A representative testimony of witness upon final proof is at p. 22a.

[7] Land Report at p. 16a.

Warranty Deed with Abstract of Title. Both of the documents placed the lands and improvements thereon in the NE1/4SE1/4 and Lots 4 and 5 of Section 28. In 1977, Foust filed for a State of Wyoming water permit for the spring located above his home. At this time the spring was again described to be in the NE1/4SE1/4 of Section 28. The State of Wyoming likewise accepted this mistaken description as correct.

11. Sixteen years after he purchased the lands, in 1979, Foust proposed to sell the river frontage of Lot 4. The Tribes wished to purchase this property but were outbid by its current owner. Foust sold the land to a non-Indian and the seeds of this dispute were sown.[8]

12. In 1979, the Tribes then requested the BIA and the BLM to conduct, at Government expense, a modern laser survey to precisely fix the boundary lines in the canyon for the first time. The only other surveys which had ever been done of this part of the canyon were the old 1906 and 1929 Government surveys noted above.[9] This new survey, conducted with modern technology, revealed the boundary line to be a few feet South of the buildings and improvements erected some fifty years prior. The land patented to Smith was determined to be on a steep canyon slope where no homestead could have possibly been built.[10]

13. After the requested survey, the Tribes put Foust on notice of trespass. With encouragement of the BIA, the

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[8] Until this time and since 1929 some fifty years had passed and no question had been raised about any erroneously conveyed patents.

[9] The map attached to the Tribes petition at 32(a) is the 1979 replat. This precise survey did not exist in 1929.

[10] Attached is a photo taken from the record, showing how close the boundary lines in dispute are situated. This photo is worth a thousand words to show the topography and how easily this mistake in description was made by both Smith and the United States, p. 19a.

parties made attempts to settle the dispute which failed.[11] In May of 1982, Foust then made application to the BLM for a correction of conveyance under the provisions of the Federal Land Policy Management Act, 43 U.S.C., 1746 ("FLPMA"), and the Tribes intervened.

14. Notwithstanding the administrative proceedings underway, the Tribes, in December of 1982, filed an action in Federal Court to annul these patents, eject Foust and collect damages. The United States refused to join the Tribes in that case. Prior requests had been made by the Tribes for the United States to bring a trespass action against Foust. The United States refused to do so and the statute of limitations has long since expired. The Tribes' Federal lawsuit was dismissed by the District Court so as to allow the parties to pursue the administrative remedy of a corrected conveyance under FLPMA.[12]

15. In disregard of the stipulated terms of the District Court's Order dismissing the Tribes' federal lawsuit, the Tribes subsequently filed an ejectment and damage case against Foust in the Shoshone and Arapahoe Tribal Court which is still pending and which case the Tribes refuse to dismiss.[13]

C. THE PROCEEDINGS AND POSITIONS OF THE PARTIES BELOW.

In the processing of Foust's application for correction of the patents, the Tribes were allowed to intervene and present their positions and objections. In their formal opposition filed with the BLM State Director in May of 1983, the Tribes listed only four objections to the application.

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[11] Interestingly enough, the concept of a land exchange as a means of settlement of the dispute as subsequently adopted by the BLM was originally suggested by the BIA.

[12] The Stipulation for Dismissal is attached at p. 40a.

[13] Refusal to hear this petition will end the Tribal Court lawsuit which is fraught with a multitude of jurisdictional problems.

They were identified as (1) the lands in question were not subject to entry under the homestead laws (2) that a clear error must be shown in the original patent (3) that equities do not favor correction of the patent, and, (4) that Foust did not have a survey done upon his purchase of the property. None of the legal issues were raised or pursued to ruling as are now seen in this petition.

Significant when examining the legal issues raised here for the first time in this petition is the fact that at the outset, the record establishes the Tribes submitted that *the Secretary had the authority to correct the patents for these lands* under Section 316 of FLPMA "where necessary to correct error." The Tribes elected to oppose the patent correction on the facts of the case, i.e., that the factual showings and record made by Foust were not sufficient to meet the criteria of the statute. The Tribes did not pursue any legal issues of whether or not the Secretary had authority to make the corrections desired for these specific lands. None of the legal issues now raised in this petition were pursued or rulings obtained from the very outset of the Administrative proceedings.[14]

The BLM State Director did a thorough field investigation and archive search which took over two years. The site was investigated and the Tribes were asked to forward any evidence why the site had any special significance to them. None was submitted.

The BIA was likewise asked to submit any evidence showing any detriment or special significance to the Tribes that would be affected by the patent correction. None was submitted. The BIA, in fact, first suggested a land exchange as a solution to this dispute. The regional solicitor advised the BIA that based upon his personal knowledge of the canyon and this homestead, the mistaken description claim of Foust may have merit and that the Secretary could correct the errors made in the patent p. 42a.

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[14] The Tribes did assert that Department of the Interior's opening of the entire township was illegal under the 1905 Act. This rather radical approach was not however pursued.

Subsequently, the BLM State Director issued his decision approving the application for correction of conveyance. The decision found existence of a mutual and clear mistake in the original conveyances which were equally caused by Smith and the Government inspector who visited the site in 1935; that the lands proposed to be entered by Smith were equally available for entry upon restoration from the powersite withdrawal at that time; and the equities favored the Foust's position.[15] Encompassed in the decision was a requirement for Foust to reconvey to the United States an equal amount of land for the benefit of the Tribes, the lands erroneously patented.

The Tribes then appealed to the IBLA.

In its statement of reasons filed with the IBLA, the Tribes did initially raise the issue of whether or not the lands at issue were subject to the FLPMA and if the Secretary could afford the relief requested by Foust. However, this issue was not pursued below. Again, the Tribes elected to defend their position on the facts of the case and not any legal issues.[16] Significantly, *the IBLA did find that the Secretary had the authority to act as it related to these lands* under the statute if the proper factual showings were made by the record. The touchstone of the IBLA decision was that (1) no clear error in fact had been sufficiently shown to exist in the descriptions contained in the patents (2) that since the lands had been withdrawn as a powersite, they were not available for or subject to entry under any circumstances and that (3) the equities did not favor the Fousts. The IBLA reversed the State Director's decision.

Foust appealed to the District Court for the District of Wyoming. In response to this appeal, the Tribes accepted

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[15] The decision of the BLM State Director is printed at 53a of the Tribes' petition and will not be repeated here.

[16] Although the Tribes claim the IBLA held a full hearing on the Appeal, it never occurred. In an IBLA appeal, if a *significant legal* issue is presented by an appeal, it must hold a full hearing. See *Stickelman v. United States*, 563 F.2d 413 (9th Cir. 1977). It did not.

the rulings of the IBLA without objection and defended same as the proper law of case. That IBLA ruling specifically included the finding that the Secretary of the Interior could correct the errors alleged in the application for these lands if the factual requirements of the statute were met. The Tribes raised none of the legal issues now proffered in this petition. They were content to defend the IBLA decision on the facts. The legal issues raised *de novo* in this petition were waived in the District Court.

The Tribes prevailed in the District Court and Foust timely filed his appeal in the Tenth Circuit.

In the Court of Appeals, the Tribes again did not pursue the legal issues they consider now paramount to them in this petition, i.e., the ability of the Secretary to correct the patents to these lands. Throughout the appeals the Tribes accepted the IBLA ruling in this respect. Prior to their loss in the Court of Appeals on the facts of the case, the Tribes had elected to oppose only on the merits. All other legal issues were again waived in the Court of Appeals.[17]

It was only with petition for rehearing, with a suggestion of a hearing en banc, were the legal issues now asserted here first raised. The Court of Appeals was unanimous in rejecting the petition for rehearing en banc. The United States refused to join in the Tribes rehearing petition.[18]

D. MISSTATEMENTS OF THE RECORD.

This respondent perceives the following misstatements of the record and cites them as required by Rule 15:

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[17] Even the dissenting opinion in the Court of Appeals agreed that the statute gave the Secretary the power to correct these patents for these lands under the unique or specific facts of this case.

[18] The United States entered the case in defense of the IBLA decision for the first time in the District Court and did not contest the authority of the Secretary to make a correction of patents for these lands. The United States also elected to defend the IBLA decision on the facts of the case. The United States now has accepted the decision of the Court of Appeals as a fair and equitable result to end this dispute.

1. At page 4, the Tribes refer to Smith's unlawful settlement of this land. There has never been any finding of fact below that Smith's entry was unlawful. The BLM and the Court of Appeals found his entry and the mistake in the conveyance to have been made in good faith.

2. At page 4, the Tribes state that Smith proceeded to build his house and improvements after his patent applications were approved on another piece of land. The record is clear that the home and improvements had been built prior to patent and before inspection by the Government agent, Caplan, on what was believed to be a properly described entry under the 1929 survey.

3. At footnote number four of page 5, the Tribes state that no patent could have issued to Smith for the SW1/4NE1/4 because he did not apply for restoration under the Federal Power Act. Such is not the established historical record. All Smith would have had to do, had he not made the mistake in description, was to have a restoration done for the adjoining parcel, as all other tracts in the Canyon did. Then a patent would have issued for the other land.

4. At page 6 of the petition, the Tribes allude to the fact that Smith did not pay for any patent on the SW1/4 NE1/4. He did pay the Tribes for the misdescribed parcel involved in this case.

5. Also at page 6, the Tribes infer that Foust did not obtain a survey in 1963 because of the cost. The record reflects that the real reason was that he was told by the County surveyor that any routine survey in the canyon would not be accurate or reliable due to the topography p. 35a. The survey needed would be a laser type survey with helicopters as was done in 1979 by the Government as only the Government was capable of doing at that time.

6. At page 7, the Tribes assert that the record establishes that the Tribes were not told of the alleged trespass until 1979. That fact strains credibility and is not supported by the record. The record reflects knowledge by both the Tribes and the BIA of the mistakes in the survey for many years and they took no action.

7. At page 9, the Tribes claim its motion for summary judgment was granted by the District Court. Such is not the record. The District Court's Order (15a of the Petition) affirms the IBLA decision under Administrative Procedures Act. 5 U.S.C. 702 and nothing more.

8. At page 10, the Tribes reportedly refer to Smith and his wife as squatters. There are absolutely no findings below of any basis for such a claim. On the contrary, the record is uncontested that Smith was a disabled War Veteran who had earned his right to a homestead properly conveyed to him by the United States without an erroneous description and that he had acted in compliance with the laws in good faith here.

REASONS FOR DENYING THE WRIT.

The Court of Appeals decision reaches a fair and equitable resolution of this private dispute between the parties. There is no public interest involved of the type that has traditionally required this Court to intervene. The Secretary of the Interior who is charged by Congress with the dual responsibilities to protect Tribal interests and to correct errors in patents has accepted the wisdom and logic of the result obtained below and does not join in this petition.

The precedent value of the Court of Appeals decision, if any, will be limited to specific facts of this unique case brought within the very narrow confines of the patent correction mechanisms of FLPMA. There are no conflicting decisions from the Circuits that deal with correcting clear errors in patents. There are no constitutional issues claimed as well. It is highly unlikely, given the passage now of over sixty years, that a similar fact situation will ever recur.

Further, the Tribes waived the legal issues below that they now consider to be a "threat to the integrity of all withdrawn public lands." Not only did the Tribes waive those legal issues, they accepted and defended the IBLA ruling that the Secretary could correct these patents for

these lands but only if the factual requirements of the statute met. The Tribes accepted those consistent rulings below and elected to defend on the merits which they lost in the Court of Appeals.

As all the parties perceived below, this case was a factual dispute concerning the history of these very specific parcels of land. This Court is now being asked to make its own factual judgments of the sufficiency of the evidence found in the Administrative records by the Tribes' Petition. This Court has traditionally refused to intervene in this type of case and should not do so here.

I. THE LEGAL QUESTIONS PRESENTED WERE NOT PRESERVED OR PURSUED BY THE TRIBES BELOW.

The record is clear that all of the legal issues presented by the Tribes now were waived below. A vast majority of the case authorities and statutes cited in the petition have never appeared in any brief or pleading below until after the Court of Appeals decision.[19] The Tribes have taken a "shotgun" approach of cleverly inserting new legal issues in order to get the Court's attention after losing on the merits. The United States has refused to join in this exercise. In fact, not only was there a waiver, the Tribes adopted and defended the rulings they obtained in the IBLA and the District Court; These rulings clearly found that the Secretary of the Interior could correct errors in these patents for these lands. The Tribes now turn a full one hundred eighty degrees in this petition. Accordingly, this respondent will ask the Court to follow its general rule that it will not decide issues raised for the first time in this Court. *Tacon v. Arizona*, 410 U.S. 351 (1973); *New York Dock Co. v. S.S. Poznan*, 274 U.S. 117 (1927); *Adams v. Mills*, 286 U.S. 397 (1932); *Minnich v. Gardner et al.*,

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[19] For example, references to the Alaska Native Claims Settlement Act, Indian Nonintercourse Act and the Trade and Intercourse Act are new to this case.

292 U.S. 48 (1934); or where the issues were not raised in the Court of Appeals. *Adickes v. S.H. Kriss & Co.*, 398 U.S. 133 (1970).

This is not the type of exceptional case that requires the Court to review issues raised de novo. *Lawn v. United States*, 355 U.S. 339 (1958). This is a private dispute which is limited to a very specific fact situation not likely to recur. No public or constitutional issues are involved. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). The issues here are limited to the specific facts of this patent mistake and concern questions of the sufficiency of the evidence in the administrative record to meet the elements of the corrective statute.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE LEGAL ISSUES.

The Court of Appeals correctly held that the 1976 Amendments to FLPMA deleted the earlier requirement of the statute that corrections to patents be based on the land's availability for entry at that time. This was the only issue of law presented to the Court of Appeals in this case upon administrative review of the IBLA decision. This lack of availability for entry argument was the very foundation of the Tribes' opposition to correction of these patents below. This was the requirement of the statute prior to the 1976 Amendment. In 1976, Congress expressly deleted that requirement from the statute. The District Court found that deletion to be ambiguous. The Court of Appeals did not. The IBLA in the two cases decided since the 1976 Amendments has recognized the Amendments as clear and explicit and held that questions of availability in the context of powersite withdrawals were no longer relevant to patent correction proceedings under the FLPMA. *Mantle Ranch Corp.*, 47 IBLA 17 (1980);[20] *Roland Oswald*, 35

[20] *Mantle* is very close to the facts of this case involving a successful patent correction in a canyon where a mistake in survey due to the topography was involved as well as a powersite reserve withdrawal.

IBLA 79 (1978). There is no conflict from other circuits nor any other reported opinion contrary to the Court of Appeals decision.

The Court of Appeals was correct in finding that these lands were subject to the patent correction mechanisms of 43 U.S.C. 1746, based upon the status of the lands at the time the errors in the conveyance were made. At that time, the Tribes had ceded these lands for sale under the homestead laws. But for the mutual mistake of the entryman and the government, the proper ceded parcel would have been sold. The Tribes have been paid and will receive here an equal land exchange. The logic of the Court of Appeals allows the corrective mechanism the FLPMA to operate here to prevent an unjust and inequitable result. The bottom line of this case is the Tribes' effort to gain a windfall in the value of the improvements made by Smith and Foust over the years and subject Foust to the extreme hardship of losing his home. The Court of Appeals understood the real motive of the Tribes' here and rejected it. The Secretary of Interior agrees with the fairness and equitable result reached by the Court of Appeals and this Court should do the same.

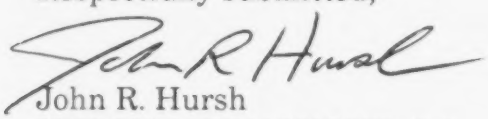
III. CONCLUSION.

Perhaps the best closing argument for Mr. Foust's opposition to this petition can be borrowed from the IBLA itself in its *Mantle*, supra, decision:

> We do not believe that after more than 40 years of paying taxes on the land, occupying it in good faith, and placing improvements thereon, a man should be deprived legal title because of this kind of technicality. This appears to us to be a case involving the kind of good faith error which Section 316 of the Federal Land Policy and Management Act of 1976 was designed and to deal with and which falls within the purview of the aforementioned Directive. 47 IBLA 17, 27.

The petition for writ of certiorari should be denied.

Respectfully submitted,



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Oliver J. Foust

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

OLIVER J. FOUST,	)	
	:	
Plaintiff,	)	
	:	
vs.	)	
	:	
MANUEL LUJAN, JR., Secretary of Interior,	)	88-CV-0235-K
	:	
	)	
Defendant,	:	
	)	
NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION.	:	
	)	
Intervenors.	:	

ORDER AND JUDGMENT

UPON the Order on Mandate entered by this Court and dated October 21, 1991, IT IS,

ORDERED THAT the decision of the State Director of the Bureau of Land Management for the State of Wyoming dated December 30, 1985 be reinstated as dispositive of this case. IT IS FURTHER,

ORDERED THAT the Bureau of Land Management shall proceed with the patent and title corrections as determined appropriate by the State Director of the BLM in his decision of December 30, 1985.

DONE this 18th day of November, 1991.

ENTERED
ON THE DOCKET
November 19, 1991
William C. Beaman
Clerk
by /s/ Betty Griess
Deputy Clerk

BY THE COURT:
/s/ Ewing T. Kerr
United States
District Judge

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

LAND REPORT TITLE PAGE

State: Wyoming
District: Rawlins
County: Hot Springs
Resource area: Lander (Wind River Indian Reservation)
Type of Action: Application for Correction of Conveyance Document – Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746, 43 CFR 1865
Serial Number: C-050733 and C-051835
Applicant's name: Oliver J. and Marjorie E. Foust
Address *(include zip code)*: Box 768, Thermopolis, WY 82433
Date(s) of examination: May 5, 1983

LANDS INVOLVED

TOWNSHIP: 6 N.
RANGE: 6 E.
MERIDIAN: WIND RIVER
SECTION: 28
SUBDIVISION: (Original Survey)
Applicant's Private Lands:

	Subdivision	Acres
C-050733, Patent No. 1087000	NE1/4	40.00
C-057835, Patent No. 1087176	Lot 4	16.43
	Lot 5	47.55
	TOTAL	103.98

Tribal Lands on Wind River Indian Reservation – Occupied by Applicant:
TOWNSHIP: 6 N.
RANGE: 6 E.
MERIDIAN: Wind River
SECTION: 28

SUBDIVISION: SE1/4NE1/4 and SW1/4NE1/4 (now described as lots 9, 10, 11, and 12)
ACRES: 80.00

Purpose of report: The purpose of this report is to determine whether or not the original patent (s) conveying the land contained errors and, if so, whether or not correction of the patent(s) pursuant to Section 316 of FLMPA is warranted.
Prepared by: /s/ Jon A. Johnson
Title: Land Law Examiner
Date of report: 12-23-85

I. INTRODUCTION

Oliver J. and Marjorie E. Foust[1] filed an Application for Correction of Conveyance Document on May 3, 1982, pursuant to Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746 (1982). The applicant is the record title owner of lots 4 and 5 and the NE1/4 SE1/4 of section 28, T. 6 N., R. 6 E., Wind River Meridian (WRM). The lands are located in Wind River Canyon within the Wind River Indian Reservation, Hot Springs County, Wyoming. (See Maps Nos. 1, 2, and 3.)

II. BACKGROUND

The Fousts acquired the above lands on June 19, 1963, by warranty deed from Evangeline Smith Meeks, widow of the original patentee, Byron H. Smith. The conveyance purportedly included a house, along with numerous other improvements, which the Fousts, upon acquisition, have occupied to the present time.

In 1968 or 1969, the Bureau of Indian Affairs (BIA) discovered that the Foust's home and other improvements were possibly in trespass on tribal lands. BIA subsequently requested survey by the Bureau of Land Management (BLM). Pursuant to Special Instructions dated August 6, 1975 and Supplemental Special Instructions dated June 14, 1979, the BLM conducted a dependent resurvey and survey of section 28, T. 6 N., R 6 E., WRM, in October and November of 1979. The plat of that resurvey and survey was approved by BLM on January 29, 1980. (See Map No. 4.)

In accordance with the special survey instructions, the S1/2NE1/4 of section 28 was subdivided into lots 9, 10, 11,

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1 Marjorie Foust died December 27, 1984.

and 12. The boundaries of lot 11 were established by BIA to include all of the Foust's improvements. (See Map No. 5.) The resurvey confirmed that the Foust's home and other improvements were located within the S1/2NE1/4 of section 28, in trespass of tribal lands, and not located on the Foust's private lands.

Following confirmation of the trespass, discussions and negotiations were conducted between the Fousts, their counselors, and tribal representatives, including tribal counsel, BIA, and BIA's Regional Solicitor. The Fousts first proposed to resolve the trespass by offering exchange of the NE1/4SE1/4 of section 28 (40 acres) for lot 11 of section 28 (9.74 acres). This offer was rejected by the tribes. They then offered to exchange lot 5 of section 28 (47.55 acres) for lots 9, 11, and 12 of section 28 (40.02 acres). That offer was also rejected by the tribes.

On March 15, 1982, the Department of the Interior Field Solicitor, Billings, Montana, wrote to the Fousts advising them that accrued damages resulting from their unauthorized occupancy from June 16, 1963, to February 15, 1980, totaled $25,000, plus an undetermined rental for 1981 and 1982. The Field Solicitor further proffered the following for discussion:

1. Payment for past rentals up to and including 1981 and 1982.

2. Execution of an easement to the Tribes to cross fee lands in lot 4, section 28, T. 6 N., R. 6 E., to obtain access to other Tribal trust lands.

3. Possibly entering into a lease by the Tribes to the lands involved in the alleged unauthorized use.

These settlement proposals were rejected by the Fousts.

With negotiations for settlement at an impasse, the Fousts

then applied to BLM for a corrective patent on May 3, 1982. They allege that the original patent was issued in error and propose a corrective patent be issued to them conveying lots 9, 11, and 12 within section 28, T. 6 N., R. 6 E., WRM, Wyoming (containing 40.02 acres). In exchange, they offer to reconvey lot 5 within section 28, T. 6 N., R. 6 E., WRM, Wyoming (containing 47.55 acres) to the United States. (See Map No. 4.)

On December 28, 1982, the Shoshone and Arapahoe Tribes filed suit against the Fousts in U.S. District Court, District of Wyoming (C82-0515). Counsel for the Fousts then filed a motion to dismiss the complaint, which Judge Kerr granted by order dated February 16, 1983.

On March 18, 1983, BLM requested the parties in interest submit information for consideration in disposition of the Foust application. On May 19, 1983, counsel for the Tribes submitted OPPOSITION OF THE SHOSHONE AND ARAPAHOE TRIBES TO THE APPLICATION TO CORRECT HOMESTEAD PATENT FILED BY OLIVER J. AND MARJORIE E. FOUST (Attachment 1); counsel for the Fousts submitted their RESPONSE OF OLIVER AND MARJORIE FOUST TO THE OPPOSITION OF THE SHOSHONE AND ARAPAHOE TRIBES (Attachment 2) on June 20, 1983; and Tribal counsel submitted their REPLY OF THE TRIBES TO THE FOUSTS' RESPONSE (Attachment 3) on July 8, 1983. These submissions are incorporated by reference in this report.

The Shoshone and Arapahoe Tribes object to approval of the Foust patent correction applications. The BIA Superintendent, Wind River Agency, and the BIA Area Director, Billings, Montana, support the Tribes' position. Counsel for the Tribes proffer four reasons for rejection of the Foust's application:

1. The land was not subject to entry under the homestead laws.

2. A clear error in the original patents was not made.

3. Equities do not favor a correction of patent.

4. Failure of the Fousts to exercise due diligence as purchasers of the lands.

BIA recommends rejection of this application because:

1. Correction of the patent would be detrimental to the Shoshone and Arapahoe Tribes.

2. It is not clear that an error in the description of the lands (Smith homesteaded) was made.

3. Support of the Tribes' position fulfills BIA's trust responsibility to the Tribes.

4. The surveys of the BLM have been relied on by numerous parties in this issue. The Tribes' rights in reliance upon these surveys have to be respected also.

III. LAND STATUS SECTION 28, T. 6 N., R. 6 E., WRM

A. History

July 3, 1868 – The Wind River Indian Reservation was established by treaty between the United States and Eastern Band of the Shoshone Tribe.

March 3, 1905 – The lands were ceded to United States pursuant to Act of March 3, 1905, 33 Stat. 1016. The lands were unsurveyed and therefore not subject to entry under the homestead laws.

February 10, 1910 – The lands were withdrawn for Temporary Power Site Withdrawal No. 115 by E. O. 2-10-1910.

July 2, 1910 – Power Site Reserve No. 115 was established by E. 0. 7-2-1910, pursuant to the Act of June 25, 1910, 36 Stat. 847. E. 0. 7-2-1910 ratified, confirmed, and continued the withdrawal created by E. 0. 2-10-1910 and included all of section 28 (unsurveyed).

November 12, 1927 – The survey plat for a portion of T. 6 N., R. 6 E., including section 28, was approved.

May 10, 1928 – Secretarial Order 5-10-1928 – Power Site Interpretation No. 115 – conformed power site withdrawal to survey. Lands in section 28 withdrawn included lots 1 through 8, SW1/4NE1/4, W1/2NW1/4 and NW1/4SW1/4.

October 5, 1928 – The Official GLO Survey Plat was filed.

December 15, 1928 – The NE1/4SE1/4 was opened to homestead entry. The five year period under Act of March 3, 1905, began.

August 29, 1930 – Lots 4 and 5 of section 28 within Power Site Reserve No. 115 were opened to entry by Restoration No. 541. The Soldier's simultaneous filing period began September 13, 1930.

August 28, 1942 – Secretarial Order 8-28-42 restored "undisposed of ceded land of the Wind River Reservation" in that portion of sec. 28, T. 6 N., R. 6 E., Wind River Meridian, lying east of the "Big Horn River" to tribal ownership. (Copies of above documents in case file.)

B. Homestead Entries C-050733 and C-051835 – Byron H. Smith

The lands owned by the Fousts were originally conveyed to Byron H. Smith by two separate patents:

1. Patent No. 1087000 for original homestead entry Cheyenne 050733 granted November 12, 1936, for the

NE1/4SE1/4 of section 28, T. 6 N., R 6 E., WRM, pursuant to R.S. 2289. No minerals were reserved.

2. Patent No. 1087176 for Stock-raising Homestead Entry Cheyenne 051835 granted November 24, 1936, for lots 4 and 5 of section 28, T. 6 N., R. 6 E., WRM, pursuant to the Act of December 29, 1916 (39 Stat. 862). All minerals were reserved to the United States.

C-050733

On December 9, 1929, Byron Smith filed Stock-raising Homestead Entry Application Cheyenne 050733 with the U.S. Land Office at Cheyenne, Wyoming, under the Act of December 29, 1916, for the NE1/4SE1/4 of section 28. The same day, the Land Office Register rejected the application stating the land was not subject to entry under the Act of March 3, 1905 Shos. On December 15, 1929, Byron Smith appealed the Register's decision correctly stating that, upon approval and filing of the survey of the lands (and issuance of the requisite opening order), they became subject to entry under the homestead laws as provided by the Act of March 3, 1905. Along with his appeal, Mr. Smith submitted Supplemental Homestead Entry C-050733 on December 15, 1929, also for the NE1/4SE1/4 of section 28, under R.S. 2289.

On July 3, 1930, the Acting Assistant Commissioner of the General Land Office advised the Register, Cheyenne Land Office, that the lands were opened to homestead entry on December 15, 1928, and returned Smith's application C-050733 for appropriate action. On July 9, 1930, Homestead Entry C-050733 was allowed under R.S. 2289.

C-051835

On September 19, 1930, Smith submitted another petition for designation for lots 4 and 5 of section 28 for an additional entry under the Stock-raising Homestead Act. Lots

4 and 5 were within Power Site Reserve No. 115 established by E.0. 7-2-1910 and had been restored to entry, subject to the provisions and reservations of Section 24 of the Federal Water Power Act (Restoration No. 541; 55724 "F" CBB of 8-29-1930). That restoration order provided for a soldier's simultaneous preference right period of filing from September 13, 1930 to October 2, 1930. Lots 4 and 5 were designated stock-raising lands on February 21, 1931, and entry Cheyenne 051835 was allowed March 16, 1931.

C. Present Status

LOT 4: Surface estate: Private. Oliver Foust. Portion west of U.S. Highway 20 conveyed to third party by Fousts
Mineral estate: Tribal owned. Restored to tribal ownership by PLO 5427 (July 23, 1974).

LOT 5: Surface estate: Private. Oliver Foust
Mineral estate: Tribal owned. Restored to tribal ownership by PLO 5427 (July 23, 1974).

Lots 4 and 5 are within Power Site Reserve No. 115.

NE1/4SE1/4: Surface and mineral estates: Oliver Foust

SE1/4NE1/4: Surface and mineral estates: Tribal owned.

SW1/4NE1/4: Surface and mineral estates: Tribal owned. Within Power Site Reserve No. 115.

IV. SITE DATA

A. Investigation

On May 5, 1983, Jon Johnson, BLM, Wyoming State Office, conducted a field investigation of the lands. The following persons accompanied the investigator:

Bob Robertson – BIA, Fort Washakie
Mr. and Mrs. Foust
Joseph Smith, Sr. – Arapahoe Business Council
Alfred Ward – Shoshone Business Council
Tom Fasse – Foust's counsel
John Hursh – Foust's counsel
Bill Thomson – Counsel, Arapahoe and Shoshone Tribes

B. Location and Identification

The Foust homestead occupies a small canyon on the east side of Wind River Canyon, within the SW1/4NE1/4 of section 28. (See photos.) All of the Fousts' improvements, including two developed springs serving the homestead, are within lot 11, created by the survey of section 28 approved January 29, 1980. (See Map No. 5.)

The lands were located using the U.S. Geological Survey Quadrangle Boysen, Wyoming, 7.5 Minute Series (topographic) – photo revised 1978. The lands were identified by location of brass cap survey monuments shown on Map No. 4.

C. Access

Access to the lands from Thermopolis or Shoshone, Wyoming is via U.S. Highway 20. The highway parallels the right bank of the Wind River through Wind River Canyon, crossing lot 4 of section 28.

Access to the Foust Homestead is by a one lane road which joins U.S. Highway 20 in the south portion of lot 4 and continues ENE for about 1/4 mile to the homestead. (See Photos 3 and 21.) This access road is the beginning of an old wagon trail, shown on the U.S.G.S. quadrangle as the Johnson Trail. (See Map No. 3.) The trail provided access south through Wind River Canyon prior to construction of tunnels for U.S. Highway 20 near the abandoned town of Boysen.

D. Improvements

(See Map No. 5 and Photos.)

The Fousts have occupied the improvements on lot 11 since acquisition from the original homestead entryman's widow in 1963. Documentary revenue stamps in the amount of $19.80 are affixed to the warranty deed conveying the land to the Fousts. According to the county clerk, Laramie County, Wyoming, tax on real estate transactions was assessed at $1.10 per $1,000, indicating the Fousts paid between $17,500 to $18,000 for the lands and improvements. Major improvements made by the Fousts since acquisition are a new double garage, a barn, a chicken house, and a cellar. (See photos.) The NE1/4SE1/4 of Section 28 is unimproved. Lot 5 of section 28 is also unimproved, except for a segment of the old Johnson Trail.

Mr. Foust stated that their house (Photos 13 and 14) and the garage/gambling hall (Photo 12) were built by Byron Smith. Mr. Foust also said there used to be another house on the land located near the river on lot 4. The Fousts have sold the portion of lot 4 west of U.S. Highway 20 and a new log house was being constructed on the land at the time of investigation. (See Photos 1 and 2.)

The spring development near AP5 of lot 11 and water pipeline were improvements made by Byron Smith and still service the homestead. The spring is of record in the Wyoming State Engineer's Office as Ollie's Spring under Permit No. U.W. 38117, having a priority date of appropriation of February 25, 1977.

V. ANALYSIS

All of the E1/2E1/2 of section 28 was open to entry when Smith filed his original SRHE application. (See LAND STATUS - History.) Also, all of the remaining portion of section 28 east of the Wind River and within Power Site

Reserve No. 115, the SE1/4NE1/4 in particular, was subject to entry. Entry was contingent upon the U.S.G.S.'s determination pursuant to Section 24 of the Federal Power Act of June 10, 1920, that the value of the land for power development purposes would not be injured or destroyed by location entry, or selection under the public land laws. Such a determination was made as to lots 4 and 5 in response to Smith's application C-051835 and the patent contains that restriction. The S1/2NE1/4 of section 28, which Smith actually occupied and improved, was equally available for entry when he filed applications C-050733 and C-051835.

All of Smith's improvements made for C-050733 and C-051835 are (or were) located within lot 4 and the S1/2 NE1/4 of section 28. Neither Smith nor the Fousts made any improvements within lot 5 or the NE1/4SE1/4 of section 28. (See maps and photos.) The case record for C-050733 clearly shows that Smith intended to file for the land in section 28 that contained the permanent spring. In his initial Petition for Designation/SRHE Application C-050733, Smith describes "...one small permanent spring with sufficient water supply for domestic purposes and for a few head of stock ..." Smith developed this spring and constructed a pipeline from the spring to his house located in the SW1/4NE1/4 of section 28. This water supply system remains in use by the Fousts today. The spring, as the 1980 resurvey shows, is located within the SE1/4NE1/4 of section 28, (near AP5 and AP6 of lot 11) and not within the NE1/4SE1/4 of section 28.

Why Smith only filed for 40 acres, the NE1/4SE1/4 of section 28, initially is subject to speculation. He may have all along thought that both the spring and the canyon bottom where he built his house and other improvements were within that subdivision. Also, the NE1/4SE1/4 of section 28 was outside of Power Site Reserve No. 115 so there would have been no delay in allowance of his entry in getting a Section 24 determination under the Federal Power

Act from U.S.G.S. Allowance of entry C-050733 also would have given Smith a preference right pursuant to Section 8 of the Stock-raising Homestead Act to enter additional contiguous lands.

Smith intended to enter the NE1/4SE1/4 of section 28 under the Stock-raising Homestead Act as stated in his original Petition for Designation C-050733. When the Cheyenne Land Office rejected his petition application C-050733, Smith appealed that decision and filed Supplemental Application C-050733 for the same land under RS 2289 five days later. The purpose of the supplemental application may have been to attempt to preserve a preference right of entry pending resolution of his appeal.

On July 8, 1930, the Acting Assistant Commissioner of the General Land Office wrote to the Register of the Cheyenne Land Office advising the NE1/4SE1/4 of section 28 was open to entry and returned application C-050733 for appropriate action. On July 9, 1930, the Cheyenne Land Office Acting Register allowed Smith's Supplemental Application C-050733 for the land under RS 2289 and not under the Stock-raising Homestead Act as Smith originally intended. The NE1/4SE1/4, along with lots 4 and 5 of section 28, were designated stockraising lands on February 21, 1931, effective March 16, 1931 (SR No. 767 – Letter 1408821), 9 months after C-050733 was allowed.

Since Smith's original entry for the NE1/4SE1/4 of section 28 was allowed under RS 2289, cultivation of the land was required. Smith filed joint final proof for C-050733 and C-051835 with the Cheyenne Land Office on September 3, 1935, showing only a small garden for cultivation claiming the rest of the land was too rocky for anything but grazing. Either Smith was advised by the Land Office that his proof did not show the requisite cultivation or he knew so. Accordingly, Smith filed an Application for Reduction of the Required Area of Cultivation on September 16, 1935, pursuant to the act of June 6, 1912; 37 Stat. 123. The GLO

did not act upon this application since the cultivation requirements on entries such as Smith's were eliminated by the Act of August 19, 1935 (49 Stat. 659).

On October 31, 1935, Max Caplan, Special Agent, Division of Investigations, DOI, Billings, Montana, investigated Smith's homesteads in response to a protest to Smith's final proof. The protest involved a third Stock-raising Homestead Entry made by Smith, C-055961, and was unrelated to the subject lands. Caplan's report corroborated statements made in Smith's final proof and recommended that entries C-050733 and C-051835 be allowed to proceed to patent. Caplan failed to note that none of Smith's homestead improvements were located on the NE1/4SE1/4 or on lot 5 as Smith claimed in his final proof.

The topography in this area of Wind River Canyon was certainly a factor contributing to Smith's error, Caplan's failure to note that error, and the long period the error remained undetected by BIA and the Fousts. The Canyon is over one half mile deep and about one and one half miles wide through section 28. (See Map No. 3 and Photos.) Topography is characterized by steep, rocky slopes and sheer cliffs. The partial survey of T. 6 N., R. 6 E., WRM, approved April 10, 1906, delineates the entire stretch of Wind River Canyon through the township as "unsurveyable." While later surveyed in 1926 and 1927, such delineation indicated the difficulty of surveying the lands and, implicitly, locating and identifying specific subdivisions.

The small canyon area where Smith built his main improvements is unique in that portion of section 28 east of the Wind River. The lands Smith intended to enter, the lands he entered, occupied and improved, and the lands the Fousts now occupy are the same lands. Those lands are all within the S1/2NE1/4of section 28.

VI. CONCLUSIONS

Clearly, Smith misdescribed the lands he entered under Homestead Entry C-050733 and SRHE C-051835. Patent No. 1087000 should have conveyed the SE1/4NE1/4 of section 28 and Patent No. 1087176 should have conveyed the SW1/4NE1/4 instead of lot 5 of section 28. Smith's error resulted from his failure to diligently identify and properly describe the lands he entered. Notwithstanding, the records show that Smith complied with the provisions of applicable laws to the satisfaction of officials of the Department of the Interior and was entitled to receive patents to lands he actually entered and improved.

I conclude that Smith's successors in interest to the above homesteads, Oliver and Marjorie Foust, acquired the lands and improvements believed to be located thereon in good faith. The Fousts too were not diligent in that they failed to ascertain that the house and other improvements were not located upon the lands they acquired from Evangeline Smith Meeks. However, the Fousts have demonstrated, and the facts of this matter show, that they are deserving of relief under Sec. 316 of FLPMA as a matter of equity and justice and should be granted that which was actually earned by the original patentee, Byron H. Smith.

VII. RECOMMENDATIONS

I recommend that Patent Correction Application C-050733/C-051835 filed by Oliver J. and Marjorie F. Foust on May 3, 1982, pursuant to Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1746, be approved. and that the errors in Patents Nos. 1087000 and 1087176 be corrected as follows:

1. Cancel the survey of section 28, T. 6 N., R. 6 E., WRM, accepted January 29, 1980, creating lots 9, 10, 11, and 12 within the S1/2NE1/4 of section 28.

2. Patent No. 1087000 – C-050733

a. Reconvey the NE1/4SE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to the United States by warranty deed.

b. Upon acceptance of title by the United States, issue a decision canceling the patent, correcting the final certificate for C-050733 to read SE1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a new and correct patent for Homestead Entry C-050733 conveying the SE1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface and mineral estates, to Oliver J. Foust.

3. Patent No. 1087176 – C-051835

a. Reconvey lot 5 of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to the United States by warranty deed.

b. Restore the SW1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, now withdrawn by S.O. 5/10/1928 for PSR No. 115, to allow conveyance subject to Section 24 of the Federal Power Act.

c. Upon acceptance of title to lot 5 of section 28 by the United States, issue decision correcting the final certificate for C-051835 to read SW1/4NE1/4 instead of lot 5 of section 28, T. 6 N., R. 6 E., WRM, and authorizing issuance of a corrective patent conveying the SW1/4NE1/4 of section 28, T. 6 N., R. 6 E., WRM, surface estate only, to Oliver J. Foust. (See Map No. 6.)

Upon reconveyance of lot 5 and the NE1/4SE1/4 of section 28 to the United States, the lands would be restored to tribal ownership by Public Land Order.

VIII. NEPA COMPLIANCE

This action is categorically excluded from the require-

ments of the National Environmental Policy Act by 516 DM 6, Appendix 5.4(B)17.

REVIEW/DECISION

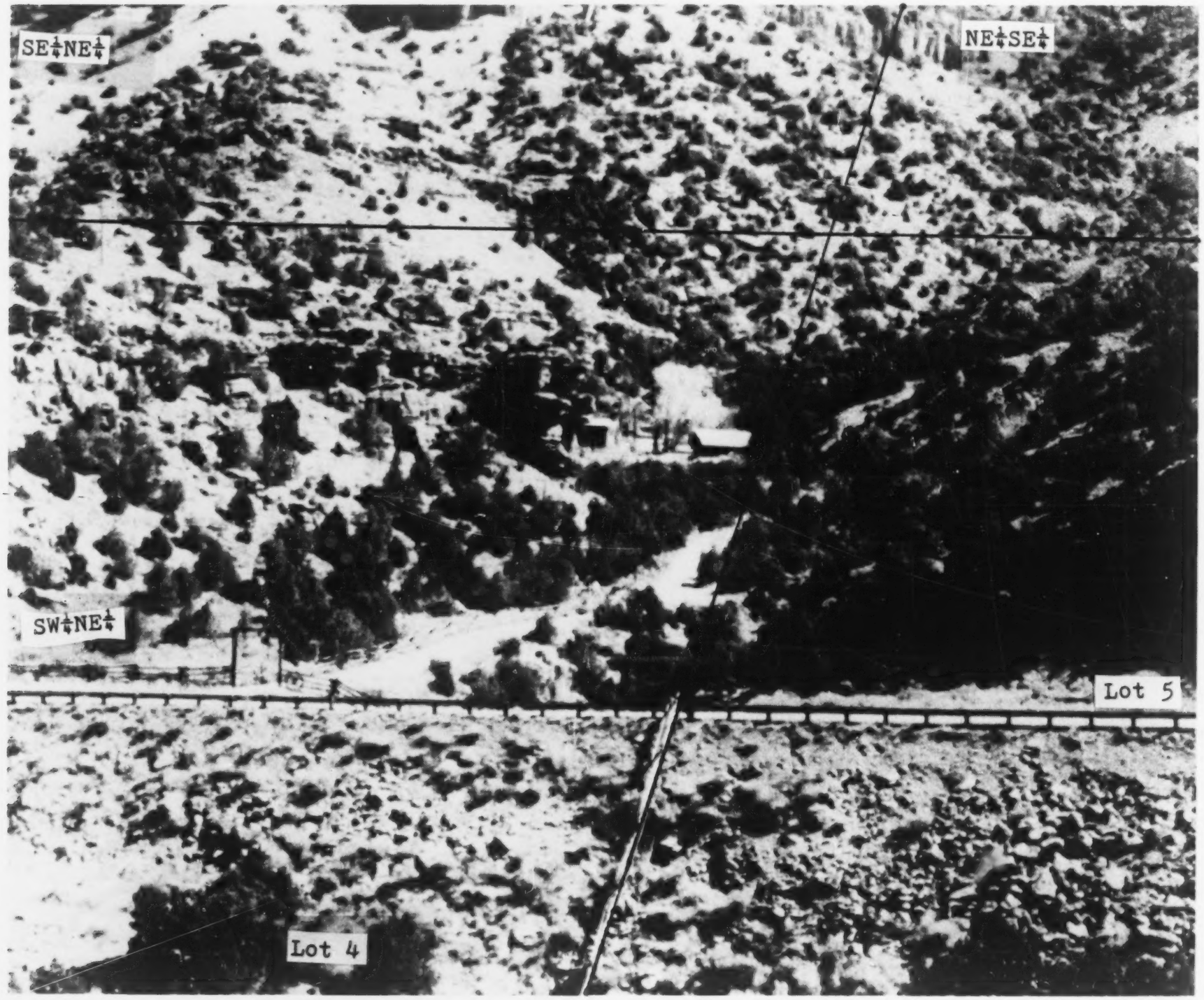
We have reviewed the recommendations in this Land Report and find that they are technically adequate and recommend they be approved as the Bureau's decision on this application.

/s/ James L. Edlefsen — 12/27/85
Chief, Branch of Land Resources — Date

/s/ L. Christian Vosler — 12-30-85
Deputy State Director, Lands and Renewable Resources — Date

APPENDIX C

Photo of the Homestead with the Boundary Lines depicted

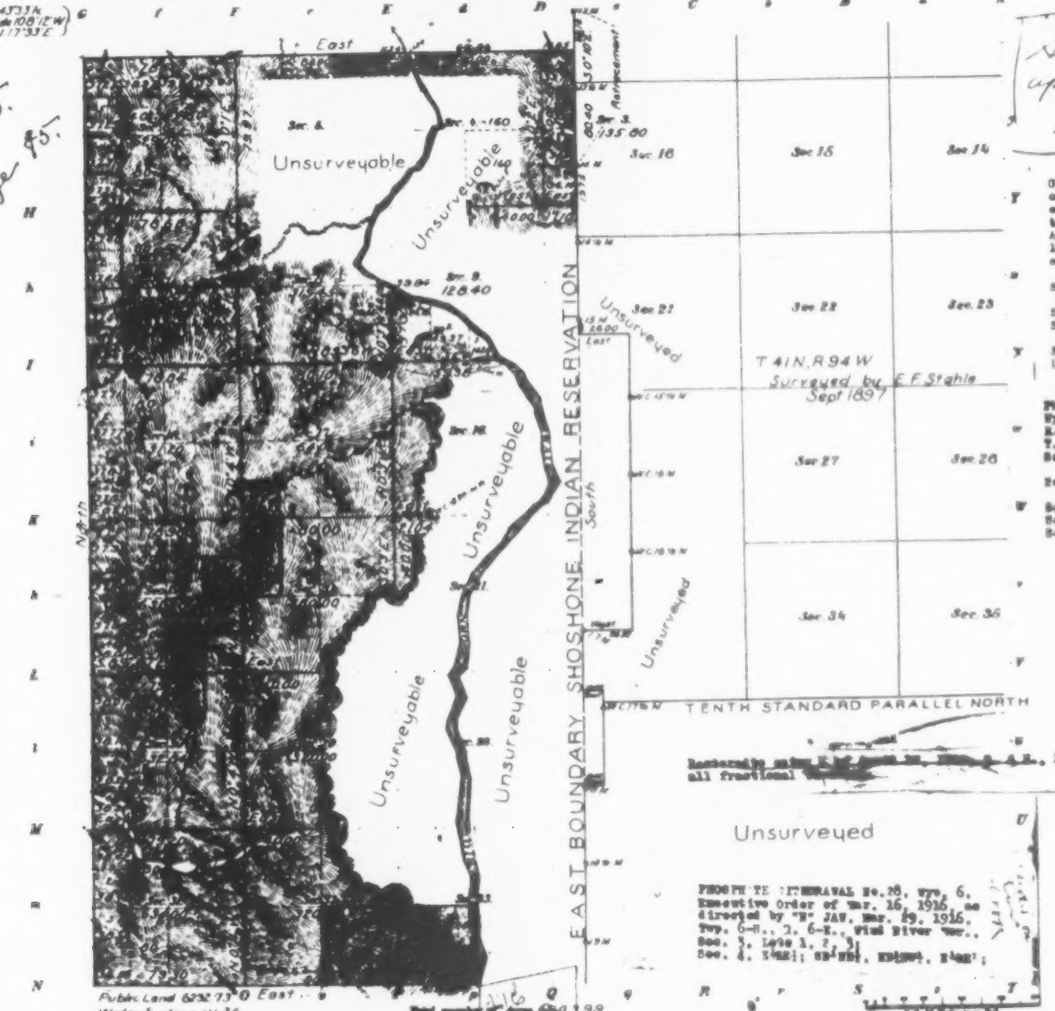

SE¼NE¼
NE¼SE¼
SW¼NE¼
Lot 5
Lot 4

APPENDIX D

1906 Survey of Section 28

(4-6758.)

Fractional Township No 6 North Range No 6 East of the Wind River Meridian Wyoming



Book 5. Page 95.

Area Sketch approved 3/20-17.8

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., That part east of Big Horn River (partly unsurveyed). Land Use District #3a

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 31, Sec. 32, Land Use District #3?

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act of 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 21, that part east of Big Horn River, Secs. 22 and 27, Secs. 28 and 33, those parts east of Big Horn River Sec. 34, Land Use District #4a

GLO Letter "E" 1936282 of 11/25/42, Dept. Order of 8/28/42, restores to tribal ownership, under Act 7/27/39, the following described Shoshone or Wind River Indian Lands: T. 6 N., R. 6 E., Sec. 3, Secs. 4,5, & 8, those parts east of Big Horn River, Sec. 9, Sec. 10 Land Use District #3?

Phosphate Reserve No. 22. Wyo. No. 5. Ex. order Aug. 25, 1914. T. 6 N., R. 6 E., Sec. 5, Sec. 7, Sec. 17, Sec. 19, Sec. 29.

Phosphate Reserve No. 24. Wyo. No. 9. Ex. Order of May 3, 1916. Classified non-phosphate. Sec. May 8, 1916. T. 6 N. R. 6 E. Sec. 5.

Phosphate Reservation No. 14. Wyo. No. 4. Ex. order July 25, 1914. Classified nonphosphate. "E" Aug. 3, 1914. T. 6 N., R. 6 E. Sec. 5. Sec. 8.

Phosphate Sec. 11. Wyo. No. 2. 8 June 6, 1911. T. 6 N., R. 6 E. Sec. 5, all Sec. 6, all Sec. 7, lots 1,2, Sec. 8.

Reservation within T. 6 N., R. 6 E. all fractional

Unsurveyed

PHOSPHATE WITHDRAWAL No. 26, Wyo. 6. Executive Order of Mar. 16, 1916, as directed by "E" JAW, Mar. 29, 1916. Twp. 6-N., R. 6-E., Wind River Mer.. Sec. 5, Lots 1, 2, 3; Sec. 6, S½E¼; SE¼NE¼, E½SE¼.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, Washington, D. C. May 4, 1917. I hereby certify that this is a true copy of the plat of official survey of the lands to which it relates, on file in this office. Commissioner.

Survey Designation	By Whom Surveyed	Date of Contract	Approved (Date)	Area (Acres)
Original Survey	D. Leonard & Horton	302 May, 1905	Nov. 2, 1905	
Subdivisions	" "	" "	" " 18, 1905	
Corrections	" "	" "	" " " "	19 75
Meanders	" "	" "	" " 19 22	14 33 65
S.I. Reservation	Frank S. Wood	230 Dec. 16, 1906	6 00 00	April 4 & 1907
Remeasured & Subdivided	E. Bailey Drummond	Brown 307 May, 1905	1 00 40	Nov. 15, 1913

The above Plat of Township No. 6 North of Range No. 6 East of the Wind River Meridian Wyoming is hereby approved to the field notes of the survey thereof on file in this office and is hereby ordered approved. Surveyor General's Office, Cheyenne, Wyoming, April 12, 1907. S. Ephraim P. Hanson

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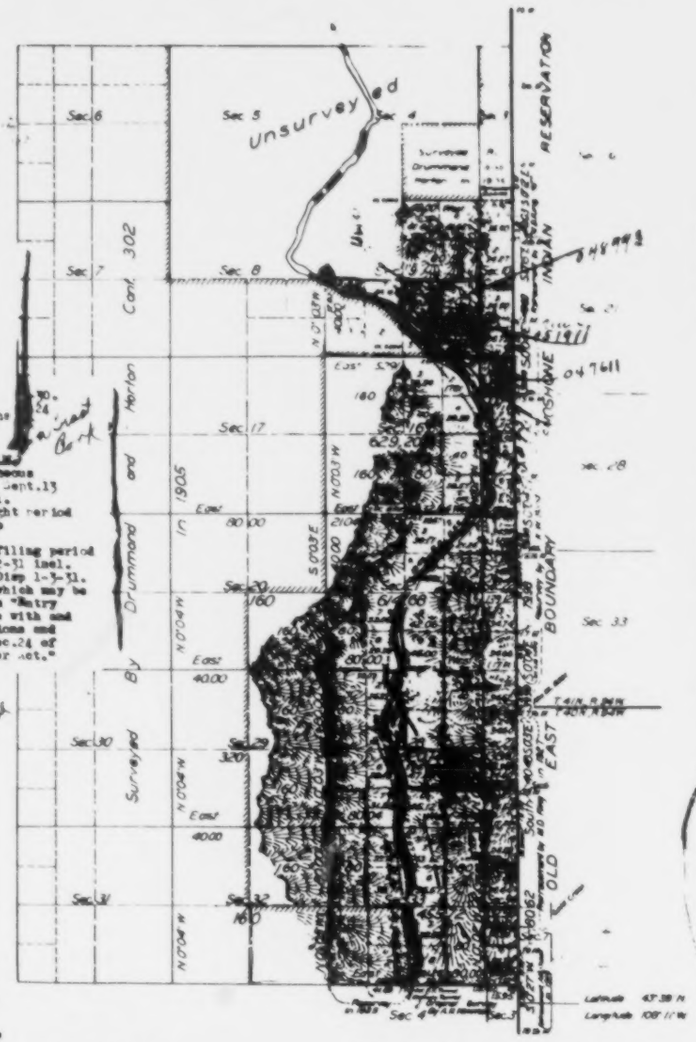
APPENDIX E

1929 Survey of Section 28

TOWNSHIP Nº 6 NORTH, RANGE Nº 6 EAST OF THE WIND RIVER MERIDIAN, WYOMING



Filed October 5, 1928 at 9 a.m. after public notice

Temporary withdrawal, Power site, E March 7, 1910.
T. 6 N., R. 6 E.,
Sec. 4, [illegible] Wt.
Sec. 6, [illegible]
Sec. 8, [illegible], lot 1.
Sec. 9, lots 1,2,3, [illegible], unsurveyed portion of [illegible] Bighorn River, [illegible].
Sec. 15, [illegible] of Wt.
Sec. 16, Nl.
Sec. 21, all.
Sec. 22, [illegible].
Sec. 28, all.
Sec. 33, [illegible], unsurveyed portions of E½SE¼, and W½SE¼, east of Big Horn River.

Temporary, withdrawal, power site.

Soldiers' simultaneous pref right period Sept.13 to Oct.2,1930.incl.
Soldiers' Pref right period from Oct.1,1930 to Jany.2,1931,incl.
Gen simultaneous filing period Dec.15,1930, to 1-2-31 incl.
Land open to gen Disp 1-3-31.
All applications which may be filed must contain "Entry made in accordance with and subject to provisions and reservations of sec.24 of Federal Water Power Act."

"F" CHB Sept 12,1930:
Restoration under Sec 24 of Federal Water Power Act:
Lots 6, 7, 8, 9, 10, Sec 9
Lot 1 Sec 16 T 6 N., R 6 E.
"Entries made in exact accordance with and subject to provisions and reservations of Sec 24 of the Federal Water Power Act."
Soldiers' simultaneous filing period:
From 9/27/30 to 10/16/30, inclusive
Soldiers preference right period:
From Oct 17,1930 to Jan 15, 1931, incl.
General simultaneous filing period:
From Dec 27,1930, to Jan 15, 1931.
Land open to general [illegible] January 16,1931.

Commissioner's letter "F" CHB of Nov.22, 1928.

Department of the Interior
U. S. Land Office
Cheyenne, Wyoming, Nov. 17, 1928.

Notice is hereby given that the lands shown upon plat of survey of township 6 N., range 6 east, Wind River Meridian, approved November 12, 1927 and filed in this office on October 5, 1928, being within that portion of the Shoshone Indian reservation ceded under the act of March 3, 1905 (33 Stat 1016) may now be opened to homestead entry under the provisions of said Act.

Persons who make entries for any of these lands within two years after the opening shall pay therefor at the rate of $1.50 per acre; thereafter the lands will subject to entry at the [illegible] of $1.25 per acre, payment in all cases to be made as follows: 50¢ per acre at the time of making the entry and 25¢ per acre each year thereafter until the total purchase price is paid.

The following lands as constituted to conform to the plat of survey by the Secretary on May 10, 1928 [illegible] Interpretation No. 115; and included in power site reserve No. 115, pursuant to executive order of July 2, 1910, first withdrawn for temporary power site by the Secretary on February 10, 1910, and they are therefore not subject to appropriation except in case of valid existing claims initiated prior February 10, 1910, the date when they were first withdrawn for power site reserve:

Sec. 9, Lots 6 to 10, inclusive.
Sec. 14, All Fractional.
Sec. 16, Lots 1,2,3,4,5, Excpt.
Sec. 21, Lots 1 to 9, incl. [illegible].
Sec. 22, Lot 1.
Sec. 28, Lots 1 to 8, incl.
Sec. 33, Lots 3 to 8, incl.

Date of opening November 17, 1928
Simultaneous filing period for soldiers from November 24, 1928 to December 14, 1928, incl.
Preference right filing period for soldiers from December 15, 1928 to March 15, 1929.
Simultaneous filing period for general public from December 15, 1928 to March 15, 1929, incl.
Lands open to general disposition March 16, 1929.

"F" CHB Feb.21, 1929.
Restoration under sec.24 of Federal Water Power Act.

Lots 3,4,7, Sec.15, T.6 N.,R.6 E. W.R.M.
All applications must contain the following. "Entry made in accordance with and subject to the provisions and reservations of section 24 of the Federal Water Power Act."
about restoration confirmed by wire dated 2/26/29 [illegible]

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington, D.C., February 28, 1929.
The survey represented by the plat having been correctly executed in accordance with the requirements of law and the regulations of this office is hereby accepted.

Mean Magnetic Declination. [illegible]
Scale 40 Chains to an Inch
Area Surveyed, 3978.73 Acres.

Office of U.S. Supervisor of Surveys
Denver, Colorado, November 12, 1927
Township No. 6 N., Range No. 6 E. [illegible] Meridian, Wyoming
I hereby certify that the field notes of the survey of the above entitled township have been examined and approved.

LINES DESIGNATED	BY WHOM SURVEYED	NO	GROUP DATE	MILEAGE MLS	MILEAGE CHS	WHEN SURVEYED
Exterior	R.W.Bond and M.M.King	89	Jan. 21 1928	4	63.27	Aug. 13
Subdivisional	Alberty, Bond and King	"	"	10	32.31	Aug. 15
Meander	R.W.Alberty and R.W.Bond	"	"	8	72.20	"
Connecting	Alberty, Bond and King	"	"		58.87	"

25784 "F" CHB Aug.12,1931. Restoration under sec.24 Federal Water Power Act No.6048
Lot 1 Sec.28, T.6 N.R.6 E.W.R.M. Soldier's preference right period Sept.16,1931 to Dec.15, 1931. incl. Land open to General Disposition Dec.16, 1931.
All applications which may be filed for said land must contain the following.
"Entry made in accordance with and subject to provisions and reservations of Sec.24 of the Federal Water Power Act."

25841 "F" CHB Aug.17,1931. Lots 3,4, Sec. 3, T.6 N.R.6E. withdrawn from all forms of entry or disposal under the public land laws for storage, diverting power, subject to valid rights & claims initiated prior to [illegible]

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APPENDIX F

STOCK-RAISING HOMESTEAD
FINAL PROOF
TESTIMONY OF WITNESS
DEPARTMENT OF THE INTERIOR

U.S. Land Office, Cheyenne, Wyoming Serial No. 050733
Additional Entry Serial No. 051835

NOTE: – The officer before whom this proof is made will see that all answers are complete and responsive to the questions, and that the answers bring out the pertinent facts showing the entryman's compliance, or noncompliance, with the laws under which the land was entered. Neither the claimant nor the other witness may be present while the testimony of this witness is being taken.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. Name, Arthur W. Crowley; age, 44 years; P.O. address, Thermopolis, Wyoming

QUESTION 2. Are you the same person who was mentioned in the published notice as Art Crowley (Officer before whom proof is taken will fill in the name as published.)

ANSWER. Yes

QUESTION 3. How long have you known the claimant in this case and the NE1/4SE1/4 Sec. 23 and Lots 4, 5, Section 28, Township 6 N., Range 6 E., Wind River Meridian, the land embraced in Homestead Entries No. 050733 & 051835, made at the Cheyenne, Wyoming, Land Office?

ANSWER. I have known claimant 8 years, the land 20 years.

QUESTION 4. (a) Is entryman married? (b) Of whom does entryman's family consist?

ANSWER. (a) Yes (b) wife and self

QUESTION 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

ANSWER. No.

QUESTION 6. If this proof is for an additional entry, state whether the entryman has resided upon such additional entry or upon his original entry.

ANSWER. Original

QUESTION 7. (a) At what date did entryman establish actual residence on said homestead? (b) Is there now a habitable house upon the land?

ANSWER. (a) 1930 (b) Yes

QUESTION 8. Has entryman, or entryman's family, maintained a residence elsewhere than on this land at any time since residence was thus established?

ANSWER. No

QUESTION 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon? If so, state when, for how long, and for what reason.

ANSWER. Only for short times. Believe he has lived there all the time.

QUESTION 10. Considering each residence year as beginning at the date on which actual residence was established, state the number of months during each residence year that entryman actually resided upon the land.

ANSWER. First year, 10 months; Second year, 10 months; Third year, 10 months; Fourth year, 10 months; Fifth year, all of 1935 until now.

QUESTION 11. With regard to the land for which this proof is offered, state: (a) the kind of soil, (b) contour of the surface, as "level", "rolling", "rough", "hilly", "mountainous", etc., (c) number of acres which have been cultivated, (d) number of acres not cultivated which might be profitably cultivated, (e) number of acres containing trees of any kind, (f) number of feet of saw timber.

ANSWER. (a) rocky (b) rough and mountainous (c) 1/2 acre (d) none (e) none (f) none

QUESTION 12. State the number of acres cultivated and kind of crop planted, each year, and state to what extent the land has been used for grazing.

ANSWER. Garden spot is all cultivated. The rest is too rocky for anything but grazing.

QUESTION 13. (a) Describe fully and in detail the amount and kind of improvements on the land, stating when same were made and giving the cost of each item, and if proof is offered upon an additional entry under the stock-raising law state definitely which of such improvements are actually upon the additional entry and when they were placed there.

ANSWER.

Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: House
Cost of Materials: 1000.00
Cost of Labor: 1000.00
Total Cost: 2000.00
Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: Garage for two cars
Cost of Materials: 50.00
Cost of Labor: 50.00
Total Cost: 100.00
Year Constructed: 1932
Location of Improvements: NE1/4 SE1/4
Character of Improvements: Other Buildings
Cost of Materials: 25.00
Cost of Labor: 25.00
Total Cost: 50.00
Year Constructed: 1931
Location of Improvements: Lots 4, 5
Character of Improvements: Fence and buildings
Cost of Materials: 125.00
Cost of Labor: 40.00
Total Cost: 165.00

Total No. acres cultivated 1/2 acres. Cost of improvements on original entry $2150.00. Cost of improvements on stock-raising entry $165.00.

QUESTION 13 (b) If any portion of the land has been cultivated, reclaimed by irrigation, cleared of trees or brush, seeded to cultivated grasses, or in any manner han-

dled so as to increase its productiveness, give full details and cost of such work, stating how many acres were so treated and upon which entry said work was done.

ANSWER. About 1/2 acre of garden is all that is cultivated. It probably cost $100.00 to make it.

QUESTION 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

ANSWER. No.

QUESTION 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

ANSWER. No.

QUESTION 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony?

ANSWER. Yes.

QUESTION 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

ANSWER. Probably four times each year, I have been to their house.

QUESTION 18. Are you interested in this claim, or related to the claimant? If so, how?

ANSWER. No.

QUESTION 19. Has either the claimant or the other witness been present while you were giving your above testimony?

ANSWER. No.

QUESTION 20. Have you any actual knowledge of any statement made by the claimant or the other witness in their testimony in connection with this proof?

ANSWER. No.

/s/ Arthur W. Crowley

(Sign plainly, with full Christian name.)

☛ Note. – Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (below.)

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Thermopolis, County of Hot Springs, State of Wyoming, within the Cheyenne, Wyoming, land district, this 30th day of August, 1933.

/s/ J. Ellis Lant
U.S. Commissioner
(Official Designation of Officer.)

UNITED STATES CRIMINAL CODE.

Sec. 125. Whoever, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

APPENDIX G

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Max Caplan, Special Agent /s/ Approved: Robert W. Dyer
Acting Special Agent in Charge,
Department of Interior

FAVORABLE REPORT

The Commissioner
General Land Office
Washington, D.C.

Through
Director of Investigations
Department of the Interior

Byron H. Smith of Thermopolis, Wyoming, made Homestead Entry, Sec. 2289, and ASRHE 050733-051835-055961, now Serial No. , on July 9, 1930, and March 16, 1931, for NE1/4SE1/4, Sec. 28, and Lots 4, 5, Sec. 28, T. 6 N., R. 6 E., Cheyenne, Wyoming, Land District, upon which proof was made August 30, 1935, was protested, and final certificate, No. not, issued pending field investigation and report.

1. Date of examination: October 21, 1935.

2. Character of land: Original entry extremely rough and rocky, containing scattered scrub cedars not commercially valuable and two small springs sufficient for domestic use. Additional entry level to rough and rocky, with small area suitable for cultivation.

3. Residence: Available evidence is to the effect that temporary residence was established about July 1930, and that from March 1, 1932, up to and including the date of investigation continuous residence has been maintained on the land by claimant and his family.

4. Cultivation and improvements: Approximately 1/8 of an acre cultivated as a garden on the original entry and about 3 acres cultivated as a garden and for forage crops on Lot 4 of the additional entry. There is on the original entry a stone and log house, double garage, storeroom, and

frame bath house, having a reasonable value of $2,330.00. On the additional entry there is a 3-room frame house, valued at $250.00; frame chicken house and frame coal house, valued at $50.00; and stockraising improvements consisting of a storage cellar, dug well, shed, and fencing, having a total reasonable value of $330.00.

5. Other material facts. Only approximately 1/8 of an acre has been cultivated on the original entry, the land in the entry not being adaptable for cultivation, and application for reduction in area of cultivation has been filed. However, applicant is apparently entitled to the benefits of the Act of August 19, 1935, which eliminates the necessity for cultivation.

Protest against the entry of Byron H. Smith was submitted to the Commissioner of the General Land Office by Herman A. Parker of Shoshoni, Wyoming, under date of August 1935, but this protest had reference to claimant's additional entry in T. 40 N., R. 92 W., and no adverse action against the additional entry is warranted at this time in view of claimant's residence on the original entry. It would appear that the protest should be dismissed and the entry be allowed to proceed to patent.

MC:WB
Billings, Montana
November 18, 1935

/s/ Max Caplan
Special Agent,
Department of the Interior

CONFIDENTIAL

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

REPLY PLEASE REFER TO
55724 "F" CBB

: Promulgating restoration
: under section 24 of the
: Federal water power act
: No. 541.

Register,

Cheyenne, Wyoming.

Sir:

By Executive order dated July 2, 1910, certain lands within your district were withdrawn and included in power site reserve No. 115.

The Federal Power commission has determined that lots 4 and 5, Sec. 28, T. 6 N., R. 6 E., W. R. M., would not be injured or destroyed for the purpose of power development by entry, location or selection thereof provided the same be made subject to the terms and conditions of section 24 of the Federal water power act.

In view of the foregoing, it is hereby ordered pursuant to public resolution No. 85, approved June 12, 1930, that the land described subject to valid rights and the provisions of existing withdrawals shall be opened only to entry under the homestead or desert land laws by ex-service men under the terms and conditions of said resolution and regulations issued thereunder for a period of 91 days beginning with the 35th day from and after the date of this order and thereafter any of the land remaining unentered will be subject to appropriation under any applicable public land law by the general public.

Subsequent to this order and prior to the date of restoration to general disposition as herein provided for,

no rights may be acquired to said land by settlement in advance of entry, or otherwise, except strictly in accordance herewith.

You will note upon all applications which may be filed for said lands:

> "Entry made in accordance with and subject to provisions and reservations of Sec. 24 of the Federal Water Power Act".

Very respectfully,
Acting Commissioner

Approved:
Assistant Secretary.

8-25-omo

BLM Parcel Restoration No. 541 State: Wyoming
BLM Serial 55724 F Stream: Big Horn River
Date approved 8/29/30 Stream index: 6 HE

Resulting from: DA-70 Wyoming Issued) X Determined) Date 2/19/30

No injury: X Without stipulations With stipulations (see below)

For mining only

Stipulations:

Affecting: PSR No. 115

63.98 Acres

Land restored subject to Section 24 of Federal Power Act:
T. 6 N., R. 6 E., W.R.M. sec. 28, lots 4 and 5.

APPENDIX I

APPLICATION TO CORRECT HOMESTEAD PATENT

OLIVER J. FOUST and MARJORIE E. FOUST, husband and wife, whose present address is: Box 768, Thermopolis, Hot Springs County, Wyoming, and who have no telephone, hereby apply to have an error corrected from a patent which was issued to Byron H. Smith on November 24, 1936 pursuant to the Homestead Act of Congress for a homestead located in the Wind River Canyon, Hot Springs County, Wyoming.

Authority

This Application is submitted under the statutory authority of 43 U.S.C. 1746.

Original Conveyance

Lots 4, 5 and the NE1/4SE1/4 Section 28, Township 6 North, Range 6 East, W.R.M. were originally granted to Byron H. Smith pursuant to the Homestead Acts; certified copies of said patents are attached hereto as Exhibits "A" and "B".

Record Holders

Attached hereto as Exhibit "C" is a photostatic copy of the Warranty Deed conveying Lots 4, 5 and the NE1/4SE1/4 Section 28, Township 6 North, Range 6 East, W.R.M. to Oliver J. Foust and Marjorie E. Foust, successors in title to Byron H. Smith.

History of Title

1. The area involved is located at the southern end of the Wind River Canyon near the tunnels. It is within the original boundaries of the Wind River Indian Reservation as created by the Treaty of 1868.

2. The area was ceded from the Wind River Reservation on March 3, 1905. (33 Stat. 1016)

3. The area was subsequently opened to settlement by Executive Order on June 2, 1906.

4. A placer mining claim for gold was filed on January 16, 1924 on the land by Oscar Simonson. This claim

was never perfected although assessment work was done up until 1928.

5. A placer location for building stone was filed on March 2, 1925 by various locators. Assessment work appears until 1926.

6. The patents (Exhibits A & B) followed in 1936 under the Homestead Acts of 1862. The lands were described according to the survey data available to the General Land Office as of 1930.

7. Subsequently, the United States restored to the Reservation those lands not opened to homestead patent, including the unclaimed lands in the Wind River Canyon.

8. The patentee, Byron Smith, lived on the land in question until his death in 1958. Through Probate, title passed to his widow Evangeline Smith.

9. On June 19, 1963, title was conveyed to the property to your petitioners, Oliver Foust and Marjorie Foust. (Exhibit C).

10. The Fousts have lived on the old homestead continuously since 1963. They are now elderly and semi retired.

11. On January 29, 1980, a resurvey of the steeply carved Wind River Canyon was completed by the BLM. The resurvey shows that the land believed to have been homesteaded by Byron Smith is not properly described in the homestead patent. Upon learning of this change, the BIA and the Tribes have demanded that the Fousts leave the old homestead and pay trespass fees. (Correspondence file is attached as Exhibit D).

Nature of Error

The Fousts live in the Wind River Canyon on what has traditionally been thought to be Lots 4 and 5, described above. The resurvey as conducted on January 29, 1980 only recently advised the Fousts that their present home with all of its outbuildings is no longer located on Lot 5 as previously thought, but on what is now Lot 11, Section 28, Township 6 North, Range 6 East, W.R.M., Hot Springs County, Wyoming. A misdescription of the original homestead appeared on the face of the patent.

The Fousts' home and outbuildings are located in a small canyon arising out of the Wind River, almost perpendicular to the Wind River Canyon. For approximately one mile either north or south of the Fousts' present home, there are no suitable locations for a homestead site because of the extremely rough terrain and cliffs which make up that area. Attached hereto as Exhibit "E" is a topographic map of the area showing the terrain. A photographic Exhibit "F" likewise shows the terrain.

The best evidence of the error is the layout of the land. The only site upon which a home and the various improvements could have reasonably been constructed is the present site. All of the surrounding area and especially the topography of Lot 5 is extremely rough and steep, consisting mostly of cliffs which are inaccessible for man and beast. Certainly not within the intent of a homestead.

The error was made because, until recently, no reliable survey had been made of the area. It defies common sense that a man would intentionally build a home and construct improvements without intending to live in them.

Correction of Error

The Fousts hereby propose to deed back to the United States Lot 5, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming in exchange for what is now Lots 9, 10 and 11, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming, which contain almost identical acreage. The new patent should be issued to Oliver J. Foust and Marjorie E. Foust conveying Lots 9, 11 and 12, Section 28, Township 6 North, Range 6 East, W.R.M., Wyoming.

DATED this 30 day of April, 1982.

Respectfully submitted,
/s/ Oliver J. Foust
/s/ Marjorie E. Foust
/s/ William L. Miller
Central Wyoming Law Associates,P.
105-107 South 6th East
Riverton, Wyoming 82501
Attorney for Applicants

Encl: Exhibit

A – Patent No. 88-940
B – Patent No. 88-941
C – Warranty Deed
D – Correspondence file
E – Topographical map
F – Photographs
G – Abstract of Title
H – Affidavit of Oliver J. Foust
I – Affidavit of Bonnie Bleak

APPENDIX J

AFFIDAVIT

STATE OF WYOMING)
) ss:
County of Hot Springs)

OLIVER J. FOUST being first duly sworn, deposes and states:

1. My wife, Marjorie E. Foust, and I are applying to the BLM to correct the Homestead Patent originally issued to Byron H. Smith for Lots 4 and 5, Section 28 in Township 6 North, Range 6 East, Wind River Meridian, Wyoming.

2. On June 19, 1963, my wife and I purchased Lots 4 and .5, and the NE1/4SE1/4 of Section 28, Township 6 North, Range 6 East, from Evangeline Smith who was the wife of Byron H. Smith the man who homesteaded the property where we presently reside.

3. My wife and I presently reside in a home located in the Wind River Canyon in Hot Springs County, Wyoming in a small valley which lies almost perpendicular to the Wind River Canyon.

4. We purchased the home where we presently live from Evangeline Smith in 1963 as set forth above. At the time of the purchase, Mrs. Smith told us that our present home and its outbuildings lie in Lot 5. We were further informed that that area had been homestead by Mrs. Smith's husband and that is how they had acquired title to that property.

5. Our home and outbuildings lie in a small valley which is surrounded on three sides by extremely rough terrain. For approximately one mile either way from our home, there are no locations in the Wind River Canyon that are suitable for building a home because of the extremely rough terrain and steep cliffs which run directly into the Wind River.

6. From time to time I have remodeled the home in which I presently live and in various places I have found notations that were made by Byron H. Smith indicating that he built the home in 1932.

7. At the time my wife and I purchased the property where we presently live, we were informed that the buildings were located on the building as described in the Warranty Deed that was given to us. I contacted Mr. Lewis Toth in Thermopolis, Wyoming and conferred with him regarding a survey of the area. Mr. Toth was a surveyor and had surveyed the highway through the Wind River Canyon at various times. Mr. Toth informed me at the time of the purchase of the home that it was very difficult to survey in the Wind River Canyon and that so far as he knew, there had been no accurate survey made of the area which I was purchasing.

8. From 1963 until 1980 my wife and I lived undisturbed in our present home. In 1980, the BLM conducted a resurvey of the Wind River Canyon at the request of the BIA. A helicopter was used to conduct the survey and after that survey was completed, I was informed by the BIA and the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation that my present home was located on Tribal land and was not located on the land to which I had a Deed. We attempted to negotiate our differences with the Tribes to no avail and presently they are threatening to take my home away from me and charge me in excess of $23,000.00 for trespass.

9. I have spoken with several people who grew up in the area, including Bonnie Bleak and her brother Jim White. Both of these people grew up in this area and their father, Bob White, helped Mr. Byron Smith construct the home in which I live, which is originally the homestead cabin. From Mr. White and Ms. Bleak, I learned that everyone in the area has always thought that the home and outbuildings where I presently live was the homestead of Byron Smith and that is where he lived and constructed his improvements to qualify for a homestead.

10. The only explanation that anyone can give me as

to why now it would appear that the buildings are not on the land described in the original homestead is that Byron Smith who was known as "Barney" must have made a mistake in describing the land that he was homesteading.

11. The land, as described in the Deed that I received, especially Lot 5, is extremely rough terrain consisting of steep mountain sides and cliffs. There are no locations on said Lot upon which a house could be constructed. There would be no conceivable reason why anyone would attempt to homestead such rough terrain.

12. The only conclusion I can reach regarding the reason why the house where I am presently located is not located on the property described in the Deed I received from Evangeline Smith and the homestead that Byron H. Smith acquired is because he made a mistake in applying for the land.

13. Until the survey was completed in 1980, I always believed that my house was located on Lot 5, Section 28, Township 6 North, Range 6 East, Wind River Meridian, Hot Springs County, Wyoming. All of the people I have spoken with who are familiar with the area, were of the same impression. Traditionally, all of the people who grew up in the area and have lived in the area have considered the little valley in which I presently live as the "old Barney Smith homestead".

FURTHER AFFIANT SAITH NOT.

OLIVER J. FOUST

Subscribed and sworn to before me this 30 day of April, 1982.

WITNESS my hand and official seal.

/s/ Jack R. Huml
Notary Pubic
My commission expires: 11/10/84

APPENDIX K

AFFIDAVIT

STATE OF WYOMING)
) ss:
County of Hot Springs)

BONNIE BLEAK being first duly sworn, depose and states:

1. I presently live in the Wind River Canyon near the property where Oliver and Marjorie Foust presently live. I am presently 57years old and I was born and raised in the Wind River Canyon.

2. When I was a young girl, I can remember my father helping Byron H. Smith, or Barney Smith as we knew him, construct Barney's homestead cabin. That homestead cabin is the house Oliver Faust presently lives in.

3. Until Oliver recently informed me that the home he lives in does not lie within the land described in Barney's Homestead Patent, I hade (sic) thought that the building Oliver lives in was located, on Barney Smith's homestead property.

4. The terrain surrounding the home of Oliver Foust is very rough and the only suitable place to live in the area is that area where Oliver has his home and the various outbuildings from that home.

5. Until this matter with the resurvey arose, there was never any question in my mind or of any of the people who have lived here for any length of time that the home where Oliver lives was located on Barney Smith's homestead.

6. If the present Deeds do not show the land where Oliver's home and buildings are located as that being described in Barney's Homestead Deed, then Barney or someone made a mistake because no one has ever considered that Barney homesteaded any area other than where the buildings of Oliver Foust are presently located.

FURTHER AFFIANT SAITH NOT.

/s/ BONNIE BLEAK

Subscribed and sworn to before me this 30 day of April, 1982.

WITNESS my hand and official seal.

/s/ Jack R. Huml
Notary Public
My commission expires: 11/10/84

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

SHOSHONE AND ARAPAHOE TRIBES	)	
	)	
v.	)	No. C82-0515
	)	
OLIVER AND MARJORIE FOUST	)	

STIPULATION

In order to permit the United States Department of the Interior to rule on defendants' application to correct homestead patent and for any administrative appeal of that ruling to be completed before the issues raised in this court are litigated, and, if possible, to avoid the necessity of litigation, the parties stipulate:

1. This action, No. C82-0515, shall be dismissed without prejudice, each party bearing his own costs.

2. This action shall not be recommenced before the disposition of defendants' application to correct homestead patent has been completed through administrative appeal unless it is necessary for plaintiffs to recommence the action to avoid the operation of 28 U.S.C. 2415 or other statutes of limitation.

Respectfully submitted,

/s/ John Hursh
John Hursh
CENTRAL WYOMING LAW ASSOCIATES, P.C.
105-107 South 6th East
Riverton, Wyoming 82501
Attorney for the Defendants

/s/ Harry R. Sachse
Harry R. Sachse
SONOSKY, CHAMBERS, SACHSE & GUIDO

1050 - 31st Street, N.W.
Washington, D.C. 20007
Attorney for the Shoshone
Indian Tribe

/s/ Robert S. Pelcyger
Robert S. Pelcyger
FREDERICKS & PELCYGER
Suite 240-1007 Pearl Street
Boulder, Colorado 80302
Attorney for the Arapahoe
Indian Tribe

/s/ William J. Thomsen
William J. Thomsen
204 E 22nd Street
Cheyenne, Wyoming 82001
Local Counsel for the
Shoshone Indian Tribe and the
Arapahoe Indian Tribe

APPENDIX M

April 16, 1982

Memorandum

To: Area Director, Indian Affairs, Billings
Attn: Rights Protection

From: Field Solicitor, Billings

Subject: Alleged Unauthorized Use of Tribal Trust Property
Township 6 North, Range 6 East, W.R.M., Lot 11
Oliver J. Foust

Attached is a copy of an April 3, 1982, letter from William L. Miller, attorney, Riverton, Wyoming, counsel for Mr. and Mrs. Oliver Foust. The letter is in response to our March 15, 1982, letter to the Fousts.

I have discussed the matter with local Bureau of Land Management employees (note, different state offices involved) and it would appear that there may be some merit to the mistake argument of the Fousts. If an error in the description were made, and can be proven, then, pursuant to 43 CFR 1821.6-1 through 1821.6-6, the patent can be amended.

Accordingly, we request that our March 15, 1982, letter and the April 8, 1982, response be referred to the Tribe and tribal attorneys for their comments.

If you have any questions concerning this matter, please feel free to call upon our office.

The file is returned.

Richard K. Aldrich
For the Field Solicitor

Enclosure

cc:
Regional Solicitor,Denver, CO
Superintendent, Wind River Agency, Fort Washakie, WY
(w/cy April 8, 1982, ltr. to ea.)

RKAldrich:cp

AFFIDAVIT OF MAILING

I, John R. Hursh, the attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the FEBRUARY 19, 1992, I deposited in the United States Post Office located at Riverton, Wyoming, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

John R. Hursh
Hursh & Donohoue, P.C.
105-107 South 6th East
Riverton, Wyoming 82501
(307) 856-4157
Attorney for Respondent

STATE OF WYOMING)
: ss
County of Fremont)

SUBSCRIBED AND SWORN to before me this 19 day of Feb, 1992.

Notary Public
My commission expires:

ROBIN MONTGOMERY-NOTARY PUBLIC
STATE OF WYOMING COUNTY OF FREMONT
MY COMMISSION EXPIRES MAR. 20, 1993

CERTIFICATE OF SERVICE

I, John R. Hursh, the attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the February 19, 1992, I served copies of this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

Susan M. Williams
Counsel of Record
Gover, Stetson & Williams
2501 Rio Grande
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Albuquerque, NM 87104
(505) 842-6961

Kenneth W. Starr
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Attorneys for Petitioner
Northern Arapaho Tribe

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Land and Natural Resources Division
Department of Justice
P.O. Box 23795
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202-514-2110
Attorney for Respondent
Manuel Lujan, Jr. Secretary of
the Interior

John R. Hursh
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105-107 South 6th East
Riverton, Wyoming 82501
(307) 856-4157
Attorney for Respondent

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-1209

In the Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION, PETITIONERS

v.

OLIVER J. FOUST AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

ANNE S. ALMY
ANDREW C. MERGEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, under 43 U.S.C. 1746, the Secretary of the Interior may correct a patent disposing of public land so as to grant title to land that had been withdrawn from entry (as a powersite reserve) at the time the land was settled.

2. Whether the land at issue—which was conveyed to the United States pursuant to an agreement calling for the government to pay any proceeds derived from sales of the land to Indian Tribes and then was purportedly patented to non-Indians—is properly characterized as "public land" or "Indian land" for purposes of 43 U.S.C. 1746.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1209

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION, PETITIONERS

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OLIVER J. FOUST AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 942 F.2d 712. The opinion of the district court (Pet. App. 15a-31a) is unreported. The opinion of the Interior Board of Land Appeals (Pet. App. 33a-52a) is reported at 102 I.B.L.A. 256.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1991. A petition for rehearing was denied on October 24, 1991. Pet. App. 58a-59a. The petition for a writ of certiorari was filed on January

22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of the Interior to "correct patents or documents of conveyance * * * relating to the disposal of public lands where necessary in order to eliminate errors." 43 U.S.C. 1746. Under the statute, "public lands" is defined so as not to include "lands held for the benefit of Indians." 43 U.S.C. 1702(e). The regulations implementing the statute further provide that "error" is "limited to mistakes of fact and not of law." 43 C.F.R. 1865.0-5(b) (1990). In addition, the Board of Land Appeals of the Department of the Interior (IBLA) has made clear that the "[a]mendment of a patent is an extraordinary action, and one who seeks to do so must establish that error did occur." *Ben R. Williams*, 57 I.B.L.A. 8, 14 (1981). And a patent correction is a discretionary matter, so an applicant who successfully establishes that a factual error occurred must also demonstrate that considerations of equity and justice warrant the issuance of a patent correction. *George Val Snow*, 79 I.B.L.A. 261, 262 (1984).

2. In 1982, respondent Oliver Foust applied, pursuant to Section 1746, for a correction to a land patent issued by the United States in 1936 to Byron Smith, Foust's predecessor in title. Pet. App. 2a, 35a. The land at issue is located on a portion of the Wind River Indian Reservation that was opened to entry by non-Indians in 1905. Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016. Under the 1905 Act, "the United States agree[d] to pay the said Indians the proceeds

derived from the sale of said lands." Pet. App. 63a. In 1910, a portion of the land was withdrawn from entry as a federal powersite reserve. *Id.* at 65a-69a. Smith subsequently built two houses and garages on land that had been opened to entry by the 1905 Act. The patent that he requested and received in 1936 was for the "NE1/4 SE1/4 and lots 4 and 5" of Section 28 of the land. *Id.* at 2a.

In 1942, the United States restored all undisposed land within Section 28 to the ownership of petitioners, the Northern Arapaho and Shoshone Indian Tribes of the Wind River Reservation. Pet. App. 75a-79a. The undisposed land included the land that had been set aside as a powersite reserve. In 1963, Smith's widow conveyed the NE1/4 SE1/4 and lots 4 and 5 to Foust by warranty deed. In 1979, a resurvey of the area showed that the buildings that Smith had built and indicated as being on the NE1/4 SE1/4 were, in actuality, located on the SW1/4 NE1/4—that is, on the land that had been set aside as a powersite reserve. *Id.* at 2a-3a.

In his request for a patent correction, Foust contended that Smith had mistakenly built on the powersite reserve because of the difficulty in surveying mountainous terrain and ascertaining lot boundaries. Pet. App. 35a. Foust asserted that this mistake of fact could be corrected under Section 1746, and he proposed deeding back to the United States (and hence to the Tribes) the NE1/4 SE1/4 and lot 5 in exchange for roughly equal acreage on which the buildings are located. *Id.* at 35a-36a. The Bureau of Land Management (BLM) approved Foust's application for a correction and his proposed remedy. *Id.* at 53a-57a.

3. The IBLA reversed BLM's decision. Pet. App. 33a-52a. The IBLA first concluded that it was not

clear that Smith had made a mistake of fact. In reaching that conclusion, the IBLA was impressed by the fact that the land for which Smith obtained a patent and the powersite reserve "touch only at a corner and do not share a single boundary." *Id.* at 44a. The IBLA thought it "extremely unlikely that Smith mistakenly confused the location." *Ibid.* The IBLA suggested that Smith had intentionally misdescribed the land because "had Smith applied for the lands which he actually improved, his application would have been rejected because the lands were included in a powersite withdrawal." *Ibid.*

The IBLA further found that the equities did not favor Foust. In that regard, it stressed that the same survey techniques used in 1979 to determine that the land Smith had improved was on the powersite reserve were available in 1963 when Foust purchased the property from Smith's widow. Pet. App. 48a. The IBLA would not forgive "the apparent neglect of a purchaser who failed to obtain a survey of lands prior to sale." *Ibid.*

4. The United States District Court for the District of Wyoming affirmed the IBLA's decision. Pet. App. 15a-31a. The court concluded that "an extensive review of the administrative record compiled in this matter convinces the Court that the IBLA decision is not arbitrary and capricious but, rather, is supported by substantial evidence and is in conformity with the law." *Id.* at 30a.

In addition to finding a reasonable basis for the IBLA's conclusions that Smith did not make a mistake of fact and the equities do not favor Foust, the district court questioned whether relief was available under Section 1746 in any event because the land in question was not open to entry, but had been reserved as a potential powersite. The court acknowledged

that Congress amended FLPMA in 1976 to delete language requiring that patent corrections be limited to cases where the land at issue was available for entry. However, after noting that "the legislative history is silent as to why the prior language was deleted," the court "view[ed] the deletion of the entry language from § 1746 as part of a concerted effort to simplify public land administration while retaining the basic precepts of public land law." Pet. App. 27a-28a.

5. The court of appeals reversed the district court's judgment and held that the IBLA decision was not supported by substantial evidence and was arbitrary and capricious. Pet. App. 1a-14a. As an initial matter, the court concluded that "[t]he meaning of the congressional amendment deleting the entry language is clear: the statute no longer requires the land's availability for entry to correct a patent." *Id.* at 5a. Accordingly, the court held that the fact that the land on which Smith built was a powersite reserve in 1936 did not preclude the Secretary of the Interior from correcting the patent. The court also rejected the Tribes' argument that the Secretary cannot correct the patent because the land was restored to the Tribes in 1942. The court said that what mattered was that "the lands in question were public lands at the time the patent was issued," because the lot "was owned by the United States, administered by the Secretary, and not held in trust for the Indians in 1936." *Id.* at 5a-6a.

The court of appeals next found "overwhelming evidence of mutual mistake of fact." Pet. App. 7a. In that regard, the court found most significant the fact that in 1935, before the patent was issued, "a special agent for the Department of Interior con-

ducted a field investigation and determined that Smith had resided on the land he claimed he had entered." *Id.* at 9a. The court also stressed that Smith had described the lot as having a spring, and the only spring in the area was on the powersite reserve. *Id.* at 8a. The court of appeals acknowledged that "[t]he lack of a common boundary * * * does raise a question about how the mistake could have been made," but concluded that "[t]he difficulty of surveying the area at the time because of the rough and steep topography could account for everyone's mistaken belief." *Id.* at 10a.

The court of appeals went on to hold that the equities favored Foust. The court stressed that Foust "is elderly, widowed, and living on the land in question." Pet. App. 11a. It added that "[h]e has lived there for twenty-eight years, paid the taxes, maintained the property, and made further improvements. He would suffer severe economic hardship if he were to lose his home." *Id.* at 11a-12a. The court added that a "win for the Indians would appear to be a windfall to the extent of the excess value of the improvements." *Id.* at 13a.

Judge McKay dissented. Pet. App. 14a. He "agree[d] with the majority that 43 U.S.C. § 1746 provides statutory authority to reform the deed at issue." *Ibid.* And he added that "[h]ad I been the Interior Board of Land Appeals (IBLA), I would have weighed the facts largely as the majority has done." *Ibid.* But he could not say that the IBLA's decision was arbitrary and capricious or was not supported by substantial evidence. *Ibid.*

ARGUMENT

In the lower courts, the Secretary of the Interior defended the decision of the Interior Board of Land Appeals by arguing, first, that the evidence did not clearly show that Smith had made a mistake of fact and second, that the equities do not favor Foust. We continue to believe that the IBLA's decision was not arbitrary and capricious or unsupported by substantial evidence. However, neither of those factbound issues warrants review by this Court. Nor do the legal issues raised by the Tribes in their petition. Whatever the merits of the Tribes' positions on those novel questions, the practical consequences of the court of appeals' decision appear to be quite limited, since the court recognized that the Secretary has authority to correct a patent only where a strong showing can be made that a mistake of fact occurred and the equities favor correction.

1. Petitioners first argue that the court of appeals erred by concluding that the Secretary of the Interior had authority under Section 1746 to correct the patent since the land on which Smith built had been set aside as a powersite reserve. Pet. 11-19. In petitioners' view, the fact that the land was withdrawn from entry at the time Smith made his improvements precludes the Secretary from correcting the patent. Pet. 18-19. There is no merit to this argument.

Before 1976, the Secretary was expressly prohibited from amending a patent when the result would be to convey land that was not subject to entry. 43 U.S.C. 697 (1964). This prohibition does not appear in 43 U.S.C. 1746. The court of appeals held that "[t]he meaning of the congressional amendment is clear: the statute no longer requires the land's availability for entry to correct a patent." Pet. App. 5a. On this point, the court of appeals' decision is sound. And

contrary to petitioners' contentions, Congress's action may not be ignored because "the legislative history is silent as to why the language of 43 U.S.C. § 697, requiring the consideration of the availability of the land sought, was deleted." Pet. 18. Congress's action speaks for itself.

Nor is there any conflict on this point between the decision of the court of appeals and any decision of this Court or another court of appeals. Petitioners note that a number of courts have held that a homesteader who occupies public land that has been withdrawn from entry acquires no legal or equitable rights. Pet. 11-15. That proposition is not contrary to the further conclusion that the Secretary may correct a patent if it appears that a mistake of fact has been made and that the equities favor correction of the patent. None of the cases cited by the petitioners involved the question presented here: whether Section 1746 authorizes the correction of a patent to convey land that was actually withdrawn from entry at the time it was settled.

2. Petitioners also contend that the patent in question is not subject to correction because the land at issue is Indian land, not public land. Pet. 19-29. In this connection, they correctly note that Section 1746 authorizes the correction of patents relating to the disposal of "public lands," Pet. 21, and that Section 1702(e)(2) excludes from the definition of "public lands" lands that are "held for the benefit of Indians." Pet. 24.

Petitioners present two different arguments in support of their claim that the patent in question is not subject to correction because the land at issue is Indian land. The first is the argument considered and rejected by the court of appeals, which is based on the fact that the powersite reserve was returned

to the Tribes in 1942. Pet. 11-19. The court said that what mattered "is whether the lands in question were public lands at the time the patent was issued." Pet. App. 6a. That conclusion is not plainly contrary to the statutory language. Nor is there any conflict between the decision below and any decision of this Court or another court of appeals on that question.

The second argument, which was not considered by the court of appeals, is that the land at issue was not public land in 1936, but rather was Indian land, because it was held in trust for the benefit of the Tribes. Pet. 19-24. The basis for this argument is that the land had been opened to entry by non-Indians in 1905 pursuant to an Act of Congress requiring the government to "pay the said Indians the proceeds derived from sales of said lands," Pet. App. 63a, and this Court held in *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 166 (1920), that land that had been ceded by Indians to the government pursuant to a similar agreement remained "Indian land" until it was sold. More specifically, *Ash Sheep* involved a statute providing that any person who allowed livestock to graze on "land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." See *id.* at 163. The agreement at issue in *Ash Sheep* provided that the government "would pay the proceeds [of land sales] to the Indians," and the Court held on account of that agreement that "the lands described in the bill were 'Indian lands' when the company pastured its sheep upon them." *Id.* at 165, 166.

Whether the holding of *Ash Sheep* should be extended from the context of an action to recover a penalty for grazing to the context of this case is a nice question. On the one hand, there is no apparent reason why land should be Indian land for purposes

of the grazing statute but not for purposes of the patent correction statute. On the other land, petitioners' interpretation of the statute may lead to harsh results—for example, under their construction of the statute Foust would lose his property even if it were absolutely clear that Smith had made a mistake of fact and Foust had done everything possible to ensure that the property he purchased had been surveyed accurately.

But whether the rule of *Ash Sheep* should be applied here does not warrant review by this Court at this time. As an initial matter, no court—including the court below—has addressed the issue. And petitioners cannot complain about the failure of the court of appeals to address the issue: although they cited *Ash Sheep* in the statement of the case in their brief in the court of appeals (Petrs.' C.A. Br. 8), they did not argue on the merits that correction of the patent was barred because the land was "Indian land" at the time it was settled by Smith. Rather, in addition to arguing that the IBLA correctly determined that it was not clear that Smith had made a mistake of fact and that the equities did not favor Foust, petitioners argued to the court of appeals that a patent correction could not issue because the lands "were not available for entry when they were initially settled" because they "had been set aside as a powersite reserve" in 1910. Petrs.' C.A. Br. 14-24. The court of appeals addressed that argument and rejected it.

In addition, review is not warranted as to whether the land in question is properly characterized as public land or as Indian land because the practical effect of the court of appeals' decision appears to be quite limited. The court recognized that decisions of the IBLA are subject to review under a deferential standard, Pet. App. 3a-4a, and further recognized that

Foust had to show both that Smith had made a mistake of fact and that the equities favored correction of the patent. *Id.* at 5a, 11a. In the court of appeals' view, there was "overwhelming evidence" that Smith had made a mistake of fact. *Id.* at 7a. While we disagree with that conclusion, litigants challenging a decision of the IBLA will not often be able to make a showing as strong as the one Foust was able to present. In particular, we think it will be an unusual case where an applicant for a patent correction will be able to show that a government agent inspected the land and agreed with an erroneous description of the property, the evidence that the court of appeals found "most significant[]" in this case. *Id.* at 9a. And especially as summarized by the court of appeals, Foust was able to present a strong case on the equities, since he is an elderly widower who has lived on the land for many years and "would suffer severe economic hardship if he were to lose his home." *Id.* at 12a.

In short, petitioners exaggerate the importance of the decision below by claiming that "the decision threatens tribal land throughout the nation." Pet. 19. To the contrary, insofar as petitioners' *Ash Sheep* argument is concerned, the decision below has no precedential effect, because the court of appeals did not consider that argument. Moreover, we think it unlikely that more than a few applicants for patent correction will be able to mount as strong a case as Foust. If we are wrong, review may be warranted at some point. But review is not warranted now, when no court has decided whether land that has been conveyed to the United States pursuant to an agreement requiring the government to pay the proceeds of land sales to Indian Tribes is properly characterized as "public land" or "Indian land" for purposes of 43 U.S.C. 1746.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45375

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

(4)

No. 91-1209

In The

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October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR.,
Secretary of the Interior,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Response Briefs filed by Oliver J. Foust ("Foust") and Manual J. Lujan, Jr., Secretary of the Interior ("Secretary") assert that two issues raised in the Northern Arapaho and Shoshone Indian Tribes' ("Tribes") Petition for Writ of Certiorari were not raised before or addressed by the United States Court of Appeals for the Tenth Circuit. Foust and the Secretary claim that the decision of the Court of Appeals does not decide whether lands unavailable for homesteading when entered may be conveyed to a homesteader pursuant to a patent correction, or whether, through a patent correction, an entryman may acquire title to land owned by an Indian Tribe.

See Foust's Brief at 13-14; Secretary's Brief at 9-10. This Court may decline to address issues that were not raised below or squarely considered by the Court of Appeals. *See Robertson v. Seattle Audubon Society*, Case No. 90-1596, 1992 W.L. 54323 at 7 (U.S. March 25, 1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1975); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Duignan v. United States*, 274 U.S. 195, 200 (1957). However, where, as here, the issues were squarely addressed by the Court of Appeals, they are properly included in the Tribes' Petition and may be addressed by this Court. Moreover, the writ of certiorari exists precisely so that this Court can address issues that the Court of Appeals decided in a manner that conflicts with prior decisions of this Court and lower courts and which are, as the Secretary notes, unsupported by the evidence. *See* Secretary's Brief at 7, 11.

ARGUMENT

Foust and the Secretary have failed to review closely the Court of Appeals' opinion. The issues they claim were not raised before or addressed by the Tenth Circuit are explicitly addressed in section I of the court's opinion. *See Foust v. Lujan*, 942 F.2d 712 (10th Cir. 1991), reproduced in the Appendix to the Petition for Writ of Certiorari and hereafter referred to as "App. at ___".

The Federal Land Policy and Management Act's ("FLPMA") patent correction provision, 43 U.S.C. § 1746, only applies to "public land". *See* 43 U.S.C. § 1702(e). The Tenth Circuit initially considered whether the SW¼NE¼ of Section 28 was public land and, therefore, subject to FLPMA's patent correction provision. App. at 4a. In determining that issue, the court found that the relevant period of inquiry was the time at which the patents were issued – in this instance 1936. App. at 6a.

The issue of whether the land in question was public land subject to FLPMA's patent correction provision was presented, argued and determined before the Interior Board of Land Appeals ("IBLA"), the United States District Court for

the District of Wyoming ("District Court") and the Court of Appeals. Contrary to Foust's assertion, Foust's Brief at 13, the IBLA and the District Court

> found that § 1746 *does not allow what Foust proposes*, because the SW¼NE¼ had been withdrawn from homestead entry for the purpose of a power reserve at the time the patents were issued.

App. at 5a (emphasis added).

This finding, not that proffered by Foust, was supported by the Tribes at every stage of this litigation. The Tenth Circuit, however, disagreed with the Tribes and the interpretation of the administrative agency authorized to implement the statute and held that

> [a] finding that the Secretary . . . cannot correct a patent to include lands that were not subject to entry by the original patentee is not in accordance with the law.

App. at 6a.

Whether § 1746 applies to land that was not available for entry was squarely addressed by the Tenth Circuit. As set out in the Tribes' Petition at 12-19, the Tenth Circuit's decision to disregard the withdrawn status of the land in question is contrary to this Court's longstanding refusal to recognize any legal or equitable interest in an entryman who settles on public land that is not open to homestead. The issue is properly included in the Tribes' Petition and the writ of certiorari should issue so that this Court can address the Tenth Circuit's deviation from established principles of public land law.

As part of its determination of whether the land in question was public land at the time the patents issued, the Court of Appeals was obliged to consider the Tribes' ownership interest in the land in 1936. App. at 5a-6a. While the Tenth Circuit failed to provide any analysis, it did not fail to decide the issue. The court found:

> We are . . . unpersuaded by the Indians' argument that the Secretary cannot correct a patent when doing so would require conveyance of tribal land. We agree that the lands now held by the United

> States in trust for Indians are not public lands. *See* 43 U.S.C. § 1702(e). The relevant inquiry, however, is whether the lands in question were public lands at the time the patent was issued. The lot in question here, the SW¼NE¼, was owned by the United States, administered by the Secretary, *and not held in trust for the Indians in 1936,* and it therefore was public land under the statutory definition.

App. at 6a (emphasis added). The court very clearly recognized that the Tribes has raised the issue of the status of the land in question and just as clearly determined that the land was public land *because it was not held in trust for the Tribes.* (The issue, and the applicability of *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920), was discussed by the Tribes' counsel at oral argument.) Yet, the Secretary inexplicably contends that the issue was not considered by the Court of Appeals. Secretary's Brief at 9-10.

The Tenth Circuit's decision to disregard the Tribes' interest in the land in 1936 is an essential underpinning of the court's holding; namely, that the patent correction provisions of FLPMA applied in this instance because the land was "public land", and not "Indian land". As the Tribes argue in their Petition at 21-24, the court's failure to recognize the Tribes' interest is in direct conflict with this Court's recognition that, where a tribe conditionally cedes land, the land does not become public land until the tribe receives full compensation. *Ash Sheep,* 252 U.S. at 162. That issue was properly presented in the Tribes' Petition.

Ash Sheep has never been interpreted as narrowly as the Secretary suggests. Secretary's Brief at 9-10. *See, e.g., Solem v. South Dakota State Penitentiary,* 465 U.S. 463, 468 (1984); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 601 n. 24 (1977); *State of Idaho v. Andrus,* 720 F.2d 1461, 1465-67 (9th Cir. 1983); *United States v. Consolidated Mines & Smelting Co.,* 455 F.2d 432, 437 (9th Cir. 1971); *Hansen v. United States,* 153 F.2d 162, 163 (10th Cir. 1946); *Red Lake Band of Chippewas v. City of Baudette,* 730 F.Supp. 972, 974-75 (D.Minn 1990); *Ute Indian Tribe v. Utah,* 521 F.Supp. 1072, 1099-1100 (D.Utah 1981). Moreover, the impacts flowing from the

Tribes' interpretation does not lead to the harsh result suggested by the Secretary. Secretary's Brief at 10. If Foust had taken the steps any reasonable purchaser of real property takes prior to concluding a sale, including arranging for a survey, he would have discovered that the buildings he thought he was purchasing were not located on the land he was, in fact, purchasing.

As the Secretary notes at page 9 of his brief, the application of *Ash Sheep* to this case presents a "nice question" for this Court's consideration. Because essential rights of the Tribes are at stake and because the Tenth Circuit's decision in this case conflicts with this Court's and lower courts' application of *Ash Sheep*, the time for deciding that "nice question" is now.

CONCLUSION

The legal issues raised in the Tribes' Petition for Writ of Certiorari were raised and addressed by the Court of Appeals and are properly before this Court. For all these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

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April 10, 1992